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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

VS.

H THOMAS FEHN,
Defendant-Appellant.

On Petition to the United States Court of Appeal for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the federal securities laws require a person to admit guilt of an uncharged crime in a disclosure document, notwithstanding the Fifth Amendment privilege against self-incrimination?

2. Does this Court's holding in *Central Bank of Denver v. First Interstate Bank of Denver* apply to civil enforcement actions brought by the SEC? If so, may the Private Securities Litigation Reform Act of 1995 be applied retroactively to justify an injunction against future violations of the federal securities laws, based solely upon an isolated incident in 1988 that did not constitute a past violation of the law?

3. Does a Circuit Court of Appeals violate an appellant's due process rights by retroactively applying, *sua sponte*, legislation enacted after the appeal has been taken under submission, without allowing the appellant an opportunity to brief or argue the issue, so that he could demonstrate that the retroactive use of the statute violated this Court's recent pronouncements on the question?

PARTIES TO THE PROCEEDING

H Thomas Fehn and the United States Securities and Exchange Commission.

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PETITION FOR WRIT OF CERTIORARI

Petitioner H Thomas Fehn ("Fehn") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The findings of fact and conclusions of law and final judgment and order of permanent injunction of the United States District Court for the District of Nevada are unreported and are reproduced in Appendix C. The United States Court of Appeals for the Ninth Circuit issued a published opinion in this matter. The opinion is reported at 97 F.3d 1276 and is reproduced in Appendix A.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on October 9, 1996. Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*, on November 25, 1996. The Court of Appeals denied the petition for rehearing and rejected the suggestion for rehearing *en banc* by an order, filed on February 21, 1997, which is reproduced in Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the U.S. Constitution provides in relevant part:

No person . . . shall be compelled in any criminal case to be a witness against himself, . . .

Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)] provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SEC Rule 10b-5 [17 C.F.R. § 240.10b-5] provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of

interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 13(a)(2) of the Securities Exchange Act of 1934 [15 U.S.C. § 78m(a)(2)] provides:

Every issuer of a security registered pursuant to section 12 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security —

(2) Such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Section 14(a) of the Securities Exchange Act of 1934 [15 U.S.C. § 78n(a)] provides:

It shall be unlawful for any person by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection

of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

SEC Rule 14a-9(a) [17 C.F.R. § 240.14a-9(a)] provides:

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Section 15(d) of the Securities Exchange Act of 1934 [15 U.S.C. § 78o(d)] provides:

Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to the date of enactment of the Securities Acts Amendments of 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 13 of this title in respect of a security registered pursuant to section 12 of this title . . . .

Section 21(d)(1) of the Securities Exchange Act of 1934 [15 U.S.C. § 78u(d)(1)] provides:

> Whenever it shall appear to the Commission that any person is engaged or is about to engage in any acts or practices constituting a violation of any provision of this title, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this title or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

Section 32(a) of the Securities Exchange Act of 1934 [15 U.S.C. § 78ff] provides:

> Any person who willfully violates any provision of this title (other than Section 30A), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or documents required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in sub-

> section (d) of section 15 of this title or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $1,000,000 or imprisoned not more than 10 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $2,500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Section 104 of the Private Securities Litigation Reform Act of 1995 added the following new subsection to 15 U.S.C. § 78t:

> (f) Prosecution of persons who aid and abet violations. For purposes of any action brought by the Commission under paragraph (1) or (3) of Section 78u(d) of this title, any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

Rule 34(a) of the Federal Rules of Appellate Procedure provides:

> Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such

local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral Argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

STATEMENT OF THE CASE

On April 1, 1994, the district court, in a Securities and Exchange Commission enforcement action, entered a judgment of permanent injunction against H Thomas Fehn, an attorney, based upon a finding that, in 1988, he aided and abetted a client who failed to admit, in a '34 Act report, that he was guilty of uncharged criminal conduct.[1] Less than three weeks later, this Court held, in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S.Ct. 1439 (1994), that there is no civil liability for persons who aid and abet others who violate the Exchange Act. Fehn appealed to the Ninth Circuit Court of Appeals and argued, *inter alia*, that the holding in *Central Bank of Denver* applied to SEC enforcement actions (as suggested by Justice Stevens, in his dissenting opinion) and, consequently, the judgment against him should be reversed.[2]

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[1]The district court's jurisdiction was based on Sections 21(d) and 27 of the Securities Exchange Act of 1934 [15 U.S.C. §§ 78u(d) and 78aa].

[2]The Ninth Circuit's jurisdiction was based on 28 U.S.C. § 1291 and entry of a final judgment against Petitioner Fehn.

Fehn's appeal was argued and submitted on October 17, 1995. Two months later, Congress passed the Private Securities Litigation Reform Act of 1995, authorizing the SEC to bring injunctive actions against those who knowingly provide substantial assistance to another person in violation of the securities laws. Ten months later, the Ninth Circuit issued its opinion and, without giving Fehn the opportunity to either brief or argue the issue, applied the new legislation retroactively to affirm the judgment of permanent injunction against Fehn.

In issuing the permanent injunction against Fehn, the district court found that Fehn had aided and abetted his client in the preparation and filing with the SEC of three quarterly reports that failed to disclose the client's earlier violations of federal and state securities laws in connection with the original public offering of securities. Fehn was originally hired to represent the client in connection with an SEC investigation. During the course of the investigation, Fehn learned facts that exposed the client to criminal liability and he counselled the client on the Fifth Amendment privilege against self-incrimination. Fehn discovered that the client was unaware of the reporting requirements under the Exchange Act and that no required reports had been filed. Additionally, Fehn was advised that an FDA embargo on the client's main product had not been publicly disclosed by the client's company. Fehn urged the client to make the public disclosure and to file the required quarterly reports with the SEC. Fehn played a minimal role in the drafting and filing of the quarterly reports (although the district court determined Fehn's role to be substantial assistance). The reports made proper disclosure of the FDA embargo, but they did not disclose that Fehn's client had committed acts, in connection with the original public offering, that would be criminal violations of federal and state securities laws. (The client was subsequently convicted for violating the Securities Act of 1933.)

Fehn argued in the courts below that his client was not required to admit, in a publicly filed document, that he was guilty of an uncharged crime, since such a requirement would violate the client's Fifth Amendment privilege against self-incrimination.[3] Consequently, there was no violation for Fehn to aid and abet. Fehn relied upon the Second Circuit decision in *United States v. Matthews*, 787 F.2d 38 (2d. Cir. 1986) to support his advice to the client. The district court and Ninth Circuit rejected Fehn's argument. In its opinion, the Ninth Circuit, in analyzing the determinative factors set forth by this Court in *California v. Byers*, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971) found that the disclosure requirements contained in Section 10(b) and 15(d) of the Securities Exchange Act do not regulate an activity that is "permeated with criminal statutes." Additionally, the Ninth Circuit determined that "although disclosure might have revealed past criminal violations in this case, the disclosure requirement does not, in general, mandate revelation of 'inherently illegal activity.'" The Court concluded that Fehn's client's Fifth Amendment privilege against self-incrimination was, therefore, not violated by the disclosure requirements of the Exchange Act. In reaching this decision, the Ninth Circuit failed to consider Section 32 of the Exchange Act [15 U.S.C. § 78ff] which makes *any* willful violation of the Act a crime punishable by severe penalties. Nor did the Court consider the provisions of Section 21(d)(1) of the Act [15 U.S.C. § 78u(d)(1)] which authorizes the SEC to transmit evidence of such acts or practices as may constitute a violation of any provision of the Act or regulations thereunder to the Attorney General, who may then institute the necessary criminal proceedings.

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[3] Although the District Court found that Fehn aided and abetted both the corporation and the individual principal, for all practical purposes they were one and the same. There was no independent ruling body that Fehn could advise on behalf of the corporation.

The Ninth Circuit attempted to distinguish *U.S. v. Matthews* by suggesting that the disclosure laws at issue in that case (Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder) differed from the disclosure requirements of Section 10(b) and Rule 10b-5 involved here. However, the operative language of the statute and rules is identical.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split between the federal Circuit Courts of Appeals on an important constitutional issue involving the federal securities laws which require uniform application. In *U.S. v. Matthews, supra*, the Second Circuit suggested that the disclosure requirements of the Exchange Act do not require an admission of guilt of uncharged, criminal conduct, since such a requirement would violate the Fifth Amendment's privilege against self-incrimination. In this case, the Ninth Circuit has rejected that analysis and, in doing so, has misapplied this Court's holding in *California v. Byers, supra.* The compelled disclosure that is the foundation of the Court's finding of liability against Petitioner Fehn is not a simple recitation of neutral facts. *Cf., California v. Byers* (providing name and address at the scene of an accident). In this case, the courts below determined that Fehn's client was required to disclose, in a publicly filed document, that he had committed violations of federal and state securities laws, and had exposed his company to contingent civil liabilities. Such a public disclosure (in the midst of an SEC investigation) clearly confronted Fehn's client "with substantial hazards of self-incrimination" which entitled him to invoke the Fifth Amendment privilege. *See, California v. Byers, supra*, 402 U.S. at 429.

This Court should also grant the writ because the Ninth Circuit has decided a federal question in a way that conflicts

with recent, applicable decisions of this Court and, in so doing, has failed to recognize this Court's role as the authoritative interpreter of federal statutes. In *Central Bank of Denver, supra*, this Court reached "the uncontroversial conclusion . . . that the text of the 1934 Act does not itself reach those who aid and abet § 10(b) violations." (114 S.Ct. at 1448) Although *Central Bank of Denver* involved a private right of action under the Act, the principles of statutory construction that are at the heart of the decision apply with equal force to civil enforcement actions brought by the SEC. *See*, dissenting opinion of Justice Stevens. (*Ibid.*, 114 S.Ct at 1460) Under the holding of this Court in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d. 481 (1991), Fehn was entitled to the benefit of the *Central Bank of Denver* decision. The Ninth Circuit did not directly decide this issue. Instead, it affirmed the district court's judgment based on a retroactive application of a statute that was passed two months after Fehn's appeal had been fully briefed, argued and submitted for decision. In its retroactivity analysis of the statute, the Ninth Circuit ignored this Court's decisions in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994) and *Plaut v. Spendthrift Farm, Inc.*, 514, U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). In *Rivers*, this Court stated that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Ibid.*, 114 S.Ct. at 1519. Thus, when this Court interpreted the Exchange Act in *Central Bank of Denver*, by deciding that it failed to provide any liability against aiders and abettors, its opinion is declarative of what the law has always been, notwithstanding a multitude of Circuit Court of Appeals decisions to the contrary. Nevertheless, in reaching its conclusion on the retroactive application of the Private Securities Litigation Reform Act of 1995, the Ninth Circuit stated that the new legislation

"may be said to restore the legal consequences that obtained at the time of the district court's judgment against Fehn" and that this Court's *Central Bank* decision only "temporarily eliminated" those legal consequences. (97 F.3d at 1286) This analysis does not pay due respect to this Court's authority to decide what a statute has always meant.

Thirdly, this Court should grant the writ because the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In rendering its opinion in this case, the Ninth Circuit *sua sponte* and without any notice to the parties, retroactively applied a statute enacted after the appeal had been fully briefed, argued and submitted for decision. Rule 34 of the Federal Rules of Appellate Procedure entitle a party to present oral argument to the Circuit Court of Appeals except in circumstances that are clearly not applicable here (frivolous appeal; recently authoritative decision; facts and legal arguments adequately presented in the briefs). The Ninth Circuit's decision on the retroactive application of the Private Securities Reform Act of 1995 is one of first impression at the appellate level. The Ninth Circuit made the decision without benefit of any argument by Appellant Fehn and, as noted above, the Ninth Circuit failed to consider recent relevant decisions of this Court. Since the Ninth Circuit decided the case a year after oral argument and ten months after passage of the new legislation, its failure to provide Appellant Fehn with any notice of its intended retroactive application of the statute cannot be excused. Moreover, in its retroactive application of the new statute, the Circuit Court made a factual finding on Defendant's *scienter*. Since the standard under the new statute (knowingly providing substantial assistance) is different than the "reckless" standard employed by the District Court, if it was proper to apply the new statute, the matter should have been remanded to the district court for further proceedings on this issue.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: May 22, 1997

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

H. THOMAS FEHN,
Defendant-Appellant.

No. 94-16136

D.C. No.
CV-92-00946-HDM

OPINION

Appeal from the United States District Court
for the District of Nevada
Mary Johnson Lowe, Senior District Judge, Presiding*

Argued and Submitted
October 17, 1995 — San Francisco, California

Filed October 9, 1996

Before: Alfred T. Goodwin and Michael Daly Hawkins,
Circuit Judges, and James M. Fitzgerald,**
District Judge.

Opinion by Judge Hawkins

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*Honorable Mary Johnson Lowe. Senior United States District Judge for the Southern District of New York, sitting by designation.

**Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

SUMMARY

Securities/Fraud

The court of appeals affirmed a judgment and order of the district court. The court held that the Securities and Exchange Commission (SEC) has authority under the Private Securities Litigation Reform Act to bring an injunctive action against a person who aids and abets violations of federal securities laws.

When CTI Technical, Inc. made its initial public offering (IPO) of securities in 1987, it violated Nevada blue sky laws, the Securities and Exchange Act of 1934 and SEC regulations by not disclosing that Edwin Wheeler was its promoter and controlled its nominal directors. Wheeler and Stoneridge Securities, Inc., the underwriter, tried to defraud investors by manipulating the price of the securities in aftermarket trading.

The SEC's investigation of the IPO led to a permanent injunction against Wheeler and CTI. Wheeler was also convicted of securities fraud. Appellant Thomas Fehn, a California attorney with considerable experience in securities law, represented CTI and Wheeler in connection with the CTI investigation.

During the investigation, Fehn learned that CTI had violated reporting requirements of the Securities and Exchange Act (SEA) of 1934 and advised Wheeler how to achieve compliance. Wheeler refused. Fehn reviewed and edited an SEC Form 10-Q quarterly disclosure statement prepared by a CTI employee, and from it prepared two more for the next two quarters. All of the 10-Q's were filed and all mischaracterized Wheeler's relationship to CTI and did not disclose contingent liabilities arising from Wheeler's and CTI's prior securities law violations.

The SEC brought an action against Fehn alleging that he had aided and abetted violations of sections 10(b) and

15(d) (antifraud and reporting provisions) of the SEA and SEC Rules 10b-5, 12-20, and 15d-13. The district court entered a judgment against Fehn based on the charged violations. Finding that there was a reasonable likelihood of future violations by Fehn, the court also entered an order permanently enjoining him from future aiding and abetting violations of the securities laws.

On appeal, Fehn contended that *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S. Ct. 1439 (1994), decided two weeks after the permanent injunction order against him, precludes SEC injunctive actions, that the district court erred in finding that he aided and abetted violations of sections 10(b) and 15(d) and related regulations, and that the district court abused its discretion in entering a permanent injunction against him.

Central Bank held that a private plaintiff may not maintain an action for aiding and abetting violations of sections 10(b) and 15(d) and related regulations. Section 104 of the Private Securities Litigation and Reform Act of 1995 (PSLRA) provides that anyone who knowingly provides substantial assistance to another person in violating a provision of Chapter 2B (which includes sections 10(b) and 15(d)), or related regulations, is deemed in violation to the same extent as the person who receives the assistance.

[1] Section 104 provides that aiding and abetting a violation of Chapter 2B is itself a violation and is subject to injunctive and civil actions for money penalties by the SEC. [2] Legislative history confirmed that section 104 was intended to override *Central Bank*'s apparent elimination of the SEC's power to enjoin the aiding and abetting of securities law violations. [3] Section 104 covered the type of injunctive action in this case.

[4] Although the PSLRA does not expressly make section 104 applicable to conduct and events that preceded its

enactment, principles of retroactive application of statutes indicated that section 104 applied to Fehn's appeal.

[5] Although section 108 provides that the PSLRA is to apply to "private" actions only from the date of its enactment, it is silent with respect to actions by the SEC. [6] The test of retroactivity is whether the new provision attaches new legal consequences to events completed before its enactment.

[7] It appeared that section 104 did not attach new legal consequences to the events underlying the SEC's injunction of Fehn. Section 104 could be said to have restored the legal consequences that obtained at the time of the district court's judgment, but that may have been temporarily eliminated by *Central Bank*. [8] In the context of Fehn's appeal, section 104 lacks the features that make objectionable the application of a civil statute to antecedent events. Fehn's expectations were not defeated: at the time the SEC launched its investigation, *Central Bank* had not been decided and he had every reason to expect that the SEC had authority to enjoin the aiding and abetting of violations of sections 10(b) and 15(d).

[9] Another principle that made application of section 104 appropriate is that when a new statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. Intervening statutes that grant injunctive power fall under this category because relief by injunction operates *in futuro*.

[10] Before *Central Bank*, the elements of aiding and abetting under section 10(b) were: (1) an independent primary violation; (2) actual knowledge by the aider and abettor of the primary violation and of his or her role in furthering it; and (3) substantial assistance by the defendant in the commission of the primary violation. Section 104 defines aiding and abetting as: (1) the defendant acted

knowingly; (2) provided substantial assistance; and (3) "to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter." The elements of section 104 mirror the elements traditionally used to define aiding and abetting under section 10(b). The symmetry was a strong indication that Congress intended section 104 to preserve the definition of aiding and abetting as it existed pre-*Central Bank*. [11] Based on the language of section 104, its application is appropriate in the context of section 15(d).

[12] To prove a primary violation of section 10(b), the SEC was required to show that there was a misstatement or omission of material fact, made with scienter. [13] Section 15(d) is a key reporting and disclosure provision. [14] CTI and Wheeler were required to describe correctly Wheeler's role at CTI and the contingent liabilities stemming from earlier securities law violations.

[15] The deficient registration statement was disseminated to investors, prospective investors and the general public. The Form 10-Qs represented that Wheeler had only recently become president and CEO of CTI, when he had been its promoter and had directed its activities since its incorporation. [16] These statements were misleading, untrue, and material.

[17] The information in the Form 10-Qs did not reflect the exposure CTI faced in light of potential private lawsuits arising out of the facts that led to the SEC investigation, complaint and injunction, and Wheeler's conviction. The Form 10-Qs violated the provisions of Rules 10b-5 and 12b-20, which require disclosure of information when it is necessary to make other statements not misleading.

[18] In determining whether a compelled disclosure threatens self-incrimination, factors to be considered are: (1) whether the requirement targets a highly selective group

inherently suspect of criminal activity rather than the public generally; (2) whether it involves an area permeated with criminal statutes rather than an essentially noncriminal and regulatory area of inquiry; and (3) whether compliance would compel disclosure of information that would surely prove a significant link in a chain of evidence tending to establish guilt.

[19] The disclosure requirements of sections 10(b) and 15(d) do not target a highly selective group inherently suspect of criminal activity or regulate an activity that is permeated with criminal statutes. Although disclosure might have revealed past criminal violations in this case, the requirement does not in general mandate revelation of inherently illegal activity.

[20] Wheeler refused to disclose the SEC investigation and the contingent liabilities. The requisite scienter for the primary violation therefore existed. [21] Because Fehn had a hand in the editing of the Form 10-Qs and failed properly to advise Wheeler and CTI of the material omissions, he lent substantial assistance to the primary violations. [22] Fehn's efforts were not in good faith because they were not reasonable in light of well-established disclosure requirements. [23] Fehn knew that the representations in CTI's registration statement with respect to Wheeler's role were inaccurate and that there was material information about CTI that Wheeler did not wish to disclose. The "knowledge" element was clearly established.

[24] To obtain a permanent injunction the SEC had to show that there was a reasonable likelihood of future violations of the securities laws. [25] The evidence was adequate to support the permanent injunction. Fehn aided and abetted violations of key antifraud and disclosure provisions of the SEA; he possessed the requisite knowledge to aid and abet the primary violations; his lack of remorse was appar-

ent; and a significant portion of his practice involved representing clients in connection with the 1934 SEA.

COUNSEL

Gregory J. Sherwin, Fields, Fehn & Sherwin, Los Angeles, California, for the defendant-appellant.

Simon M. Lorne and Lucinda O. McConathy, Securities and Exchange Commission, Washington, D.C., for the plaintiff-appellee.

OPINION

HAWKINS, Circuit Judge:

This appeal requires us to apply Section 104 of the recently enacted Private Securities Litigation Reform Act of 1995, which expressly authorizes the Securities and Exchange Commission ("SEC") to bring injunctive actions against those who aid and abet violations of certain securities laws.

California attorney H. Thomas Fehn appeals the district court's final judgment and permanent injunction order of April 1, 1994, which ordered Fehn to refrain from aiding and abetting violations of Section 10(b) and Section 15(d) of the Securities Exchange Act of 1934 and related regulations. Fehn advances three distinct challenges to the district court's injunction. He first contends that the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S. Ct. 1439 (1994), which held that a private plaintiff may not maintain an action for aiding and abetting violations of Section 10(b) of the Securities Exchange Act, should extend to SEC injunctive actions like the one that precipitated this case. Fehn argues, in the alternative, that even if *Central Bank* does not preclude the SEC's injunctive action against him,

the district court erroneously concluded that he aided and abetted violations of Section 10(b) and Section 15(d) and related regulations. Finally, Fehn contends that the district court abused its discretion in entering a permanent injunction against him.

We have jurisdiction over this appeal from a final judgment pursuant to 28 U.S.C. § 1291. We hold that extension of *Central Bank* to SEC injunctive actions is barred by Section 104 of the recently enacted Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995). We affirm the district court's permanent injunction order because we conclude that the court correctly found that Fehn had aided and abetted violations of Section 10(b) and Section 15(d) of the Securities Exchange Act and related regulations, and did not abuse its discretion in permanently enjoining him from future aiding and abetting violations.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Initial Public Offering by CTI Technical, Inc.

CTI Technical, Inc. was incorporated in Nevada in January 1987 by its promoter, Las Vegas resident Edwin "Bud" Wheeler. Although Wheeler directed CTI's operations from the date of its incorporation, his status as company president and chief executive officer was not disclosed publicly until August 1988. In June 1987, seeking to raise capital to acquire other businesses, CTI conducted a $200,000 "blind pool" initial public offering of securities ("IPO").

The CTI offering was tainted by violations of state and federal securities laws. First, CTI violated state blue sky laws by failing to register its securities with the states in which those securities were sold. Second, although CTI filed

a Form S-18 registration statement with the SEC,[1] it violated the Securities Act of 1933 and SEC regulations[2] by failing to disclose that Wheeler was the promoter of the company and controlled its nominal directors. Finally, Wheeler and Stoneridge Securities, Inc. underwriter for the IPO, attempted to defraud investors by manipulating the price of the securities in aftermarket trading.

II. The SEC Investigation of CTI's Initial Public Offering

In early 1988, the SEC launched a formal investigation of CTI's IPO. That investigation was to culminate in the SEC's September 1989 complaint against CTI and Wheeler. As a result of the SEC's action, the defendants consented to a permanent injunction against future securities laws violations, and Wheeler was convicted of securities fraud for misstatements and omissions in CTI's registration statement.[3]

In connection with the SEC investigation, defendant-appellant Fehn was retained to represent CTI and Wheeler, as well as CTI's underwriter and various CTI officers and directors. Fehn is a California attorney who has specialized in securities law during nearly three decades of practice. He has represented clients in connection with the registration and offering of securities under the Securities Act of 1933, compliance with reporting and disclosure requirements under the Securities Exchange Act of 1934, and litigation of

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[1] We note that CTI in fact filed two Form S-18 registration statements containing substantially the same information; this fact is not relevant to this appeal.

[2] Regulation S-K. Item 401(f) & (g), 17 C.F.R. §§ 229.401(1) & (g).

[3] Wheeler's conviction was affirmed in *United States v. Wheeler*, No. 93-10522, 1994 WL 384183 (9th Cir. July 22, 1994) (unpublished disposition).

various securities matters. Prior to Fehn's retention in connection with the SEC investigation, Fehn's law firm had represented underwriter Stoneridge Securities during CTI's IPO.

During the SEC investigation of CTI and Wheeler, Fehn became aware that CTI was not in compliance with certain reporting requirements of the Securities Exchange Act of 1934. First, Fehn learned that after the IPO, CTI had failed to file Form 10-Q quarterly reports as required by Section 15(d) of the Securities Exchange Act and related regulations. Second, Wheeler's investigative testimony before the SEC revealed that the Food and Drug Administration had banned sales of a diet product known as"Accupatch," CTI's main product and the source of gross sales of $1 million a month, and had impounded CTI's existing inventory of the product. CTI's registration documents, however, failed to disclose these FDA actions.

Fehn advised Wheeler that CTI was required to file the quarterly Form 10-Q's, and that it must disclose, in particular, the FDA's restriction of its Accupatch product. He also discussed with Wheeler whether the Securities Exchange Act required disclosure, in the Form 10-Q's, of Wheeler's and CTI's apparent violations of the Securities Act of 1933 in connection with the IPO. Wheeler flatly refused to make such disclosures. Fehn later testified that he told Wheeler it was his professional opinion that such disclosures were unnecessary under the regulations, and furthermore could impair Wheeler's ability to assert his Fifth Amendment privilege against self-incrimination with respect to those earlier violations.

Because Wheeler wished to limit CTI's expenses, he had a non-lawyer employee of CTI — rather than Fehn — draft the Form 10-Q's. Fehn gave Wheeler a copy of Regulation S-K, which outlines disclosure requirements for Form 10-Q, an instruction booklet describing how to fill out

a Form 10-Q, and a sample Form 10-Q. The employee prepared a draft of the Form 10-Q for the quarter ending March 31, 1988, which disclosed the FDA's ban on CTI's Accupatch product. However, the Form 10-Q mischaracterized Wheeler's true role in CTI, describing him as CTI's recently appointed CEO and president rather than the individual who in fact had promoted, incorporated, and controlled the company since its inception. The form also failed to disclose the potential civil liability stemming from Wheeler's and CTI's earlier violations of state and federal securities laws. Fehn reviewed and edited the draft of the Form 10-Q, incorporating financial statements he had obtained from CTI's accountant. Fehn maintains that he made no substantive changes to the document, and, in particular, did not delete from the report any information the SEC later contended was improperly omitted. Fehn's secretary mailed the final Form 10-Q to the SEC, where it was filed in August 1988.

Based on CTI's Form 10-Q for the quarter ending March 31, 1988, Fehn's law firm prepared and mailed two other Form 10-Q's, for the quarters ending December 31, 1987, and June 30, 1988, respectively. These forms, too, mischaracterized Wheeler's relationship to CTI, and failed to mention contingent liabilities stemming from CTI's and Wheeler's earlier securities law violations. Fehn insists that his involvement in the preparation of these later Form 10-Q's was minimal, but the SEC points out that editing notations in Fehn's handwriting appeared on drafts of these Form 10-Q's. These Form 10-Q's were filed in November 1988.

III. The SEC Injunctive Action Against Fehn

In November 1992, the SEC filed a complaint against Fehn, alleging that in preparing and filing the three Form 10-Q's, Fehn had aided and abetted violations of

Sections 10(b) and 15(d) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b) and 78o(d), and violations of Rules 10b-5, 12b-20, and 15d-13, 17 C.F.R. §§ 240.10b-5, 240.12b-20, and 240.15d-13. Pursuant to Section 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b), and Sections 21(d) and 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78u(d) and 78u(e), the SEC brought an action to permanently enjoin Fehn from future securities laws violations. The SEC alleged that CTI and Wheeler had violated Section 10(b) and Section 15(d) by preparing and filing Form 10-Q's that contained false accounts of Wheeler's role in the promotion, formation and management of CTI and his control over CTI stock and directors, and failed to disclose "material contingent liabilities" stemming from CTI's violations of state and federal securities laws in connection with its 1987 IPO. Additionally, the SEC alleged that Fehn had knowingly lent "substantial assist[ance]" to Wheeler and CTI in the preparation and filing of the faulty Form 10-Q's.

On April 1, 1994, following a bench trial, the district court entered final judgment against Fehn, based on its findings that Fehn had aided and abetted violations of Sections 10(b) and 15(d) of the Securities Exchange Act, the Act's antifraud and reporting provisions, respectively, along with Rules 10b-5, 12b-20, and 15d-13. Because it concluded that there was a reasonable likelihood of future violations on Fehn's part, the district court entered an order permanently enjoining Fehn from future aiding and abetting violations of the securities laws. Fehn timely appealed.

ANALYSIS

Fehn raises three challenges to the district court's permanent injunction order. First, he argues that the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S. Ct. 1439 (1994),

issued just two weeks after the permanent injunction order in this case, precludes SEC injunctive actions such as the one brought against him. Failing that challenge, he argues that the district court erred in finding that he aided and abetted violations of Sections 10(b) and 15(d) of the Securities Exchange Act and related regulations. Finally, he insists that the district court abused its discretion in entering a permanent injunction against him.

I. The SEC's Authority to Enjoin Aiding and Abetting Violations of the Securities Laws after *Central Bank*

Because Fehn's challenge to the SEC's injunctive authority presents a question of law, we review this issue de novo. *Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir.) (en banc), *cert. denied*, ____ U.S. ____ 114 S. Ct. 2125 (1994).

We note that Fehn's argument may well be precluded by recent congressional action. Concerned that *Central Bank* might be extended to eliminate the SEC's power to enjoin aiding and abetting violations, Congress recently enacted legislation reinforcing the SEC's authority to enjoin the aiding and abetting of primary violations of several securities laws.[4] That legislation, Section 104 of the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995), appears to prevent lower federal courts from extending the logic of *Central Bank* to SEC injunctive actions.

A. Section 104 of the Private Securities Litigation Reform Act of 1995

Section 104 of the Private Securities Litigation Reform Act amended the heading to 15 U.S.C. § 78t by inserting

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[4]This legislation also allows the SEC to seek money penalties in civil actions for aiding and abetting, but that aspect of the legislation is not at issue here.

the underlined portion: "Liability of controlling persons *and persons who aid and abet violations.*" Section 104 also added an entire new subsection to 15 U.S.C. § 78t. New subsection 780t(f)) reads:

(f) Prosecution of persons who aid and abet violations

For purposes of any action brought by the Commission under paragraph (1) or (3) of Section 78u(d) of this title,[5] any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

[1] By its clear terms, Section 104 provides that aiding and abetting a violation of Chapter 2B, which encompasses 15 U.S.C. § 78a through § 78kk, is itself a violation, and as such is subject to injunctive actions and civil actions for money penalties by the SEC under 15 U.S.C. §§ 78u(d)(1) and 78u(d)(3). Both Section 10(b), 15 U.S.C. § 78j(b), and Section 15(d), 15 U.S.C. § 78o(d), fall within Chapter 2B. Section 104 of the Private Securities Litigation Reform Act thus authorizes SEC injunctive actions for the aiding and abetting of violations of Sections 10(b) and 15(d) and related regulations, and thereby reverses any impact *Central Bank* might have had on the SEC's power to enjoin aiding and abetting of these Securities provisions.

[2] Legislative history confirms that Section 104 was intended to override *Central Bank's* apparent elimination of the SEC's power to enjoin the aiding and abetting of securities law violations. Discussion of the proposed legisla-

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[5]The paragraphs in Section 78u(d) to which Section 104 refers empower the SEC to enjoin securities violations and to seek money penalties in civil actions, respectively. 15 U.S.C. § 78u(d)(1) & 78u(d)(3).

tion is contained in Senate Banking Committee Report No. 104-98 on the Senate version of the bill, S. 240. That report makes clear the drafters' intent to authorize the SEC to enjoin those who aid and abet such violations:

> Prior to the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, courts of appeals had recognized that private parties could bring actions against persons who "aided and abetted" primary violators of the securities laws. In *Central Bank*, the Court held that there was no aiding and abetting liability for private lawsuits involving violations of the securities antifraud provisions.
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> The Committee considered testimony endorsing the result in *Central Bank* and testimony seeking to overturn this decision. The Committee believes that amending the 1934 Act to provide explicitly for private aiding and abetting liability actions under Section 10(b) would be contrary to S. 240's goal of reducing meritless securities litigation. *The Committee does, however, grant the SEC express authority to bring actions seeking injunctive relief or money damages against persons who knowingly aid and abet primary violators of the securities laws.*

S. Rep. No. 98, 104th Cong., (1995) (emphasis added).

The Conference Report adopted S. 240's Section 104 as part of the combined bill, H.R. 1038. *See* 141 Cong. Rec. S17.965-03. *S17,984 (daily ed. Dec. 5, 1995) (statement of Sen. Moseley-Braun). Although the Conference Report does not discuss the purpose of Section 104, floor statements by several senators consistently describe Section 104 as a provision to reinstate the SEC's power to enjoin the aiding

and abetting of the securities laws. Introducing the conference bill, Senator D'Amato remarked:

> The conference report also reinstates the SEC's authority — which the Supreme Court put into question in the *Central Bank of Denver* case — to bring actions against defendants who knowingly aid and abet securities fraud.

141 Cong. Rec. S17,933-04, *S17.934 (daily ed. Dec. 5, 1995) (statement of Sen. D'Amato).

Sen. Dodd stated that the legislation:

> restores enforcement authority to the Securities and Exchange Commission. That was lost . . . in the 1994 Supreme Court case, the *Central Bank* case. We, in this bill, restore what the *Central Bank* took away from the SEC here.
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> . . .
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> [T]he bill restores the ability of the Securities and Exchange Commission to pursue those who knowingly aid and abet securities fraud.

141 Cong. Rec. S17,933-04. *S17,957 (daily ed. Dec. 5, 1995) (statement of Sen. Dodd).

Sen. Reid noted that "[t]he compromise agreement authorizes the SEC to bring enforcement actions against those who aid and abet a securities fraud, thus reversing the Supreme Court's *Central Bank* decision as it applies to the SEC." 141 Cong. Rec. S17,965-03, *S17.977 (daily ed. Dec. 5, 1995) (statement of Sen. Reid).

Finally. in complaining about the bill's failure to create an express private cause of action against aiders and abettors, Sen. Sarbanes stated:

> This bill, unfortunately, restores only the SEC's ability to go after aiders and abettors of violations of the

> securities laws and then only in part — only in part. The provision in the bill is limited to violations of section 10(b) of the Securities Exchange Act and to defendants who act knowingly.

141 Cong. Rec. S17,933-04, *S17,937 (daily ed. Dec. 5, 1995) (statement of Sen. Sarbanes).

[3] These statements by legislators reinforce our conclusion that Section 104, by its terms, empowers the SEC to enjoin the aiding and abetting of "violation[s] of .. provision[s] of [C]hapter 2B], or of any rule or regulation issued under [C]hapter 2B]," which includes 15 U.S.C. § 78a through § 78kk. Section 104 thus covers the type of injunctive action in this case, which sought to enjoin Fehn's alleged aiding and abetting of violations of Section 10(b) and Section 15(d) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b) & 78o(d). Given the unique timing of events in this case, however, we must determine if Section 104 applies to the events underlying this particular injunctive action.

B. Whether Section 104 of the Private Securities Litigation Reform Act of 1995 Applies to this Case

A threshold consideration is whether Section 104 applies to this appeal, which was argued before Section 104 was enacted. The district court's final judgment against Fehn and permanent injunction order were entered April 1, 1994. At that moment, it was the well-settled law of this Circuit that there existed a private right of action for aiding and abetting violations of Section 10(b). *See Hauser v. Farrell*, 14 F.3d 1338, 1343 (9th Cir. 1994).[6] Just eighteen days

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[6] Also at issue in this appeal is Fehn's potential liability for aiding and abetting violations of Section 15(d) of the Securities Exchange Act, 15 U.S.C. § 78o(d). Although aiding and abetting liability under Section 15(d) is not nearly as well-established as that under Section 10(b),

later, on April 19, 1994, the Supreme Court issued its decision in *Central Bank*, eliminating the implied private cause of action for aiding and abetting violations of Section 10(b) of the Securities Exchange Act. This decision, which was premised on the Court's conclusion that the statute did not prohibit aiding and abetting, threw into doubt the viability of SEC injunctive actions like the one brought against Fehn. *Central Bank*, 511 U.S. at __ 114 S. Ct. at 1455.[7] Fehn thereafter appealed to this Court, arguing that *Central Bank* should extend to SEC injunctive actions. On December 22, 1995, two months after oral argument in this appeal. Congress overrode a presidential veto to enact the Private Securities Litigation Reform Act of 1995. Section 104 of the Act prohibits precisely what Fehn seeks in this appeal: the extension of *Central Bank* to SEC injunctive actions.

[4] This sequence of events is unusual in that the SEC's authority to enjoin aiding and abetting existed at the time of the final judgment against Fehn, was arguably precluded two weeks later by *Central Bank*, and was reinstated several weeks after the appeal was argued. Although the Private Securities Litigation Reform Act does not expressly make Section 104 applicable to conduct and events that precede its enactment, principles governing the retrospective appli-

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it does pre-date *Central Bank*. *See SEC v. Arthur Young & Co.*, 590 F.2d 785, 786 (9th Cir. 1979)

[7] Dissenting in *Central Bank*, Justice Stevens warned:

> [T]his case concerns only the existence and scope of aiding and abetting liability in suits brought by private parties under § 10(b) and Rule 10b-5. The majority's rationale, however, sweeps far beyond even those important issues. The majority leaves little doubt that the Exchange Act does not even permit the *Commission* to pursue aiders and abettors in civil enforcement actions under § 10(b) and Rule 10b-5.

Central Bank, 511 U.S. at __, 114 S. Ct. at 1459-60 (Stevens, J dissenting).

cation of statutes indicate that Section 104 applies to Fehn's appeal.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), the Supreme Court clarified the proper analysis for deciding whether a statute enacted while an appeal is pending should apply to events and conduct that occurred *before* that statute's enactment. The Court's treatment of this problem had long been fraught with confusion stemming from the clash of two "seemingly contradictory" default rules that come into play where statutes "do not specify their temporal reach." *Landgraf*, 511 U.S. at ____ 114 S. Ct. at 1496. The first default rule is that "a court is to apply the law in effect at the time it renders its decision." *Id.* (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)). The second, conflicting, default rule is that "'[r]etroactivity is not favored in the law,'" and this principle carries the "interpretive corollary that 'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.'" *Id.* (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204. 208 (1988)).

In *Landgraf*, the Court set forth an analysis intended to resolve this conflict. *Landgraf* described a two-step analysis for determining whether to apply an intervening civil statute to events that precede its enactment. When a case implicates a federal civil statute enacted after the events in suit, a court's first task is to determine "whether Congress has expressly prescribed the statute's proper reach." *Id.* at 1505. If Congress has done so, "there is no need to resort to judicial default rules," since the statute guides its application. *Id.* If, however, "the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with

respect to transactions already completed." *Id.* If the statute has "retroactive effect," explained the Court, "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

In this case. the Private Securities Litigation Reform Act, enacted December 22, 1995, does not "expressly prescribe[ ] [Section 104's] proper reach." *Id.* Within Title I of the Act, which contains Section 104, Section 108, a note entitled "Applicability," provides:

> The amendments made by this title shall not affect or apply to any *private* action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933, commenced before and pending on the date of enactment of this Act.

Section 108, Pub. L. 104-67, 109 Stat. 737 (1995) (emphasis added).

[5] Although Section 108 provides that the Act is to apply to "private" actions only from the date of enactment, the provision is silent with respect to actions by the SEC. Because the Act contains no "express[ ] prescri[ption]" as to Section 104's temporal scope, we therefore "must determine whether [Section 104] [has] retroactive effect." *Landgraf*, 511 U.S. at ___, 114 S. Ct. at 1505.

[6] To ease the tension between the *Bradley* default rule ("a court is to apply the law in effect at the time it renders its decision," *Bradley*, 416 U.S. at 711), and the presumption against retroactivity ("congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result," *Bowen*, 488 U.S. at 208), *Landgraf* clarified the definition of "retroactive" or "retrospective," terms the Court used interchangeably. It explained that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment," or "up-

sets expectations based in prior law." *Landgraf*, 511 U.S. at ___, 114 S. Ct. at 1499 (citation omitted). Instead, the test of retroactivity is *"whether the new provision attaches new legal consequences* to events completed before its enactment." *Id.* (emphasis added).

Deciding whether retroactivity exists, explained the Court, is a fact-intensive inquiry:

> The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning *the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.* Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.

Id. (emphasis added). Factors that should guide courts include "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.*[8]

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[8]We have applied the *Landgraf* retroactivity analysis in a variety of contexts. *Compare Samaniego-Meraz v. INS*, 53 F.3d, 254, 256 (9th Cir. 1995) (finding application of statutory amendment to pre-amendment events not retroactive because amendment repealed Attorney General's discretionary power to grant relief, and repeal of merely discretionary power did not "attach new legal consequences" to pre-enactment events), *with Chenault v. United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994) (holding that newly enacted statute shortening statute of limitations may not be applied to plaintiffs pre-enactment failure to timely file suit, since that application would "prejudice the rights" of the claimant), *and Hyatt v. Northrop Corp.*, 80 F.3d 1425, 1429 (9th Cir. 1996), *petition for cert. filed*, 65 USLW 3033 (July 2, 1996) (holding that statutory amendment imposing new obligations in connection with filing of suit may not be applied to bar complaint filed prior to statutory amendment, since to do so "would impose new duties" on claimant), *and United States v. $814,254.76*, 51 F.3d 207, 210 (9th Cir. 1995) (declining to apply amended civil forfeiture statute to pre-enactment events because statute, in subjecting

[7] Applying the *Landgraf* analysis here, it appears Section 104 does not "attach new legal consequences" to the events underlying the SEC's injunction of Fehn. Indeed, Section 104 may be said to restore the legal consequences that obtained at the time of the district court's judgment against Fehn, but that may have been temporarily eliminated by the *Central Bank* decision. It therefore does not "impair rights [Fehn] possessed when he acted, increase [Fehn's] liability for past conduct, or impose new duties [on Fehn] with respect to transactions already completed." *Id.* at 1505. We need not address whether Section 104, in expressly authorizing SEC injunctive actions for aiding and abetting *other* violations of Chapter 2B, creates wholly new legal consequences, since the SEC's power to enjoin aiding and abetting violations of Sections 10(b) and 15(d) antedated Section 104. *See Hauser*, 14 F.3d at 1343 (aiding and abetting liability under Section 10(b)): *SEC v. Arthur Young & Co.*, 590 F.2d 785, 786 (9th Cir. 1979) (aiding and abetting liability under Section 15(d)).

[8] Moreover, in the context of Fehn's appeal, Section 104 lacks the features that make application of a civil statute to antecedent events objectionable. The rationale undergirding the "presumption against retroactive legislation" has little relevance to the unusual sequence of events in this case. *Id.* at 1497. The presumption against retroactive legislation is grounded in "[e]lementary considerations of fairness," which "dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," and which require that "settled expectations [ ] not be lightly disrupted." *Id.* In this case, Fehn's expectations have not been defeated: at the time the SEC launched its investigation of his activities. *Central Bank* had not yet been decided and Fehn therefore had

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a broader range of funds to forfeiture. "attache[d] new legal consequences" to money laundering).

every reason to expect that the SEC had the authority to enjoin the aiding and abetting, of violations of Sections 10(b) and 15(d) of the Securities Exchange Act. Although *Central Bank* ignited a temporary hope that Fehn might be able to avoid the injunction, Congress rather swiftly undid any effect *Central Bank* had on the SEC's injunctive authority.

[9] Finally, *Landgraf* articulated another principle that makes the application of Section 104 to this case appropriate. In refining the definition of "retroactivity," the *Landgraf* court enumerated several exceptions to the general presumption against retroactivity, explaining that "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." *Id.* at 1501. One such exception has particular relevance here. This exception provides that where the new statute "authorizes or affects the propriety of *prospective relief*," the "application of the new provision is not retroactive." *Id.* (emphasis added). Intervening statutes that grant injunctive power fall under this category because "relief by injunction operates in futuro." *Id.*(citing *American Steel Foundries V. Tri-City Central Trades Council*, 257 U.S. 184, 201 (1921)). In *American Steel* Foundries, the Court held that Section 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. It remanded the case for application of the intervening statutory provision, which limited district courts' powers to enjoin labor picketing.[9]

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[9]Following *Landgraf* at least one lower federal court has held that an intervening statute that authorizes or affects prospective relief is not invalidly retroactive, and may be applied to pre-enactment events. *See Scheidemann v. INS*, 83 F.3d 1517, 1523 (3rd Cir. 1996) (applying amended statute limiting scope of Attorney General's discretion to grant

Section 104, as applied to this case. falls within that exception to the definition of retroactivity recognized by the *Landgraf* court: In authorizing, the SEC to enjoin aiding and abetting, Section 104 "authorizes or affects the propriety of prospective relief." *Landgraf*, 511 U.S. at __ 114 S.Ct. at 1501. Because Fehn's appeal implicates only the SEC's injunctive authority under the new statute, we need not address that portion of Section 104 authorizing the SEC to seek money penalties in civil actions for aiding and abetting violations of the securities laws. Based on the principles set forth in *Landgraf*, we conclude that we must apply Section 104 of the Private Securities Litigation Reform Act to Fehn's appeal. We turn next to that task.

C. The Impact of Section 104 on Fehn's *Central Bank* Argument

Having concluded that we must apply Section 104 of the Private Securities Litigation Reform Act to this appeal, we first examine its impact on Fehn's assertion that *Central Bank* implicitly precludes the SEC's injunctive action in this case. As we explained above, Section 104 expressly authorizes the SEC to bring injunctive actions against aiders and abettors of securities law violations. Congress responded rapidly and resoundingly to the Supreme Court's elimination of private actions against aiders and abettors of securities law violations. In enacting Section 104, Congress flatly barred the judicial extension of *Central Bank* to impede SEC enforcement actions against aiders and abettors. In light of Congress' emphatic repudiation of *Central Bank* in the context of SEC injunctive actions, we reject Fehn's first challenge to the permanent injunction.

Fehn also argues that his actions did not constitute aiding and abetting under Section 10(b) and Section 15(d) of the

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relief from deportation because such amendment had "only a prospective impact.").

Securities Exchange Act, and that the district court abused its discretion in permanently enjoining him from future violations. We turn next to consider the merits of these arguments.

II. Whether the District Court Erred in Finding Fehn Liable for Aiding and Abetting Violations of Section 10(b) and Section 15(d) of the Securities Exchange Act and Related Regulations

Before addressing Fehn's contention that the district court erred in permanently enjoining him from future aiding and abetting violations of Sections 10(b) and 15(d) of the Securities Exchange Act, we must first ascertain the elements of aiding and abetting liability under Section 104 of the Private Securities Litigation Reform Act.

A. The Elements of Aiding and Abetting Liability under Section 104 of the Private Securities Litigation Act of 1995

In authorizing the SEC to pursue injunctive actions for aiding and abetting violations of certain securities laws, Congress provided that Section 104 governs the "[l]iability of controlling persons *and persons who aid and abet violations.*" Section 104 provides:

> (f) Prosecution of persons who aid and abet violations. For purposes of any action brought by the Commission under paragraph (1) or (3) of Section 78u(d) of this title,[10] *any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter*, shall be deemed to be in violation of such

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[10] "The paragraphs in Section 78u(d) to which Section 104 refers empower the SEC to enjoin securities violations and to seek money penalties in civil actions, respectively, 15 U.S.C. § 78u(d)(1) & 78u(d)(3).

> provision to the same extent as the person to whom such assistance is provided. (emphasis added)

[10] We note that Congress employed language identical to that used by lower federal courts in articulating the elements of aiding and abetting under Section 10(b) *before Central Batik* eliminated private causes of action for aiding and abetting. *Before Central Bank*, the elements of aiding and abetting under Section 10(b) were: (1) the existence of an independent primary violation; (2) actual knowledge by the alleged aider and abettor of the primary violation and of his or her own role in furthering it;[11] and (3) "substantial assistance" by the defendant in the commission of the primary violation. *Hauser*, 14 F.3d at 1343. The new Section 104 defines aiding and abetting as follows: (1) the defendant acted "knowingly," (2) the defendant "provide[d] substantial assistance," and (3) that assistance was given "to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter." The elements of the new Section 104 clearly mirror the elements this Court and others traditionally used to define aiding and abetting under Section 10(b). In our view, the symmetry between the elements of aiding and abetting *before Central Bank* and after Section 104 is a strong indication that Congress intended Section 104 to preserve the definition of aiding and abetting as it existed pre-*Central Bank*.

The legislative history surrounding Section 104 bolsters our conclusion. The statements contained in that history consistently make clear that the amendment's purpose is to

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[11] We acknowledge that other decisions by this Court have defined this element as "actual knowledge or reckless disregard." *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991) (emphasis added). We do not address this discrepancy because Section 104, by its plain terms, require, "know[ledge]" as an element of aiding and abetting.

negate any effect *Central Bank* might have had on the SEC's authority to bring injunctive actions against aiders and abettors of certain securities law violations. Based on the language of the now Section 104 and its legislative history, we conclude that Section 104 simply restores the pre-*Central Bank* status quo with respect to SEC injunctive actions.

[11] The elements of aiding and abetting under Section 15(d) are more difficult to discern, simply because there are virtually no pre-*Central Bank* decisions among the lower federal courts defining aiding and abetting liability for violations of Section 15(d). In this Circuit, *Arthur Young* recognized aiding and abetting liability under Section 15(d), but did not enumerate what the SEC must prove to establish it. *Arthur Young*, 590 F.2d at 786. As noted above, however, Section 104 employs the distinctive language defining the elements of aiding and abetting under Section 10(b). Based on the language of the new Section 104, we conclude that application of a similar test is appropriate in the context of Section 15(d), namely: (1) the existence of an independent primary violation; (2) actual knowledge by the alleged aider and abettor of the primary violation and of his or her own role in furthering it; and (3) "substantial assistance" in the commission of the primary violation. *Hauser*, 14 F.3d at 1343 (setting forth elements of aiding and abetting liability under Section 10(b)).

B. Whether Fehn Aided and Abetted Violations of Sections 10(b) and 15(d) of the Securities Exchange Act and Related Regulations

Fehn's challenge to the district court's final judgment is multi-faceted. First, he contends that the district court erred in finding primary violations of Sections 10(b) and 15(d) of the Securities Exchange Act, insisting that these provisions and their implementing regulations did not require disclo-

sure of Wheeler's role as promoter, or of the contingent liabilities stemming from CTI's and Wheeler's earlier securities law violations. In the alternative, he contends that such a disclosure requirement was trumped by Wheeler's Fifth Amendment privilege against self-incrimination. He also argues that Wheeler lacked the requisite scienter for commission of the primary violation. Second, Fehn argues that, even if there were primary violations of Sections 10(b) and 15(d) and related regulations by CTI and Wheeler, Fehn did not "substantial[ly] assist" those violations. Finally, he insists that he did not possess the requisite scienter for aiding and abetting liability because his professional advice to CTI and Wheeler was offered in good faith. We review de novo the district court's conclusions of law. and we review for clear error its findings of fact. *Campbell*, 18 F.3d at 681.

1. The Existence of a Primary Violation

a. Disclosure Requirements under Section 10(b) and Section 15(d)

Section 10(b), the central antifraud provision of the Securities Exchange Act, 15 U.S.C. § 78j(b), makes it unlawful "for any person, directly or indirectly":

> To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

Rule 10b-5 further defines the conduct prohibited under Section 10(b), making it unlawful:

> (a) [t]o employ any device, scheme, or artifice to defraud,
>
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

[12] To prove a primary violation of Section 10(b) of the Securities Exchange Act, the SEC was required to "show that there has been a misstatement or omission of material fact, made with scienter." *McCormick v. Fund American Cos.*, 26 F.3d 869, 875 (9th Cir. 1994) (citations omitted). That misstatement or omission "must be misleading," *id.*, and "in the case of an omission [of material fact], 'silence, absent a duty to disclose, is not misleading under Rule 10b-5.' " *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n. 17 (1988)). Materiality "depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic*, 485 U.S. at 240.

[13] Section 15(d) is a key reporting and disclosure provision of the Securities Exchange Act, 15 U.S.C. § 78o(d). It provides that issuers that have filed registration statements with the SEC

> shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for

> the protection of investors, such *supplementary and periodic information*, documents, and reports as may be required

by other provisions of the securities laws and SEC regulations. 15 U.S.C. § 78o(d) (emphasis added).

Rule 15d-13 implements Section 15(d)'s disclosure provision by requiring issuers to file quarterly 10-Q reports. Rule 12b-20 requires that, in addition to information explicitly required by other securities regulations.

> there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.

Rule 12b-20, 17 C.F.R. § 240.12b-20.

Fehn insists that the securities laws impose no duty to disclose, in a quarterly Form 10-Q, a failure to identify a company's promoter at the time of an initial public offering or the existence of prior securities law violations.

[14] We disagree. Read against the backdrop of events in this case, these provisions required CTI and Wheeler to describe correctly Wheeler's role at CTI and to disclose the contingent liabilities stemming from earlier securities law violations.

[15] In considering whether disclosure of Wheeler's role as promoter was necessary, we first note that Item 15(d) of Form S-18, the form for submitting registration statements to the SEC, requires companies registering securities to identify their promoter in the registration statement. When CTI submitted its Form S-18 to the SEC, however, it plainly failed to disclose that Wheeler was promoter of the company. That deficient registration statement was subsequently disseminated to investors, prospective investors, and the general public. We next note that the Form 10-Q's CTI

submitted to the SEC in late 1988, at Fehn's direction and pursuant to Rule 15d-3, represented that Wheeler had only *recently* become president and CEO of CTI, when, in fact, he had been its promoter and had directed its activities since its incorporation in January 1987.

[16] These statements in the Form 10-Q's were not only misleading in their own right, but, read in conjunction with CTI's deficient Form S-18, compounded the misinformation about Wheeler's role at CTI. First, because these statements about Wheeler's role were objectively untrue and, in our view, material, the Form 10-Q's contained an "untrue statement of a material fact" in violation of Rule 10b-5. Second, the statements characterizing Wheeler's role were further misleading when read in conjunction with CTI's earlier Form S-18. Because the Form S-18 had previously failed to identify Wheeler as CTI's promoter, the Form 10-Q's representation that Wheeler had only recently joined the company further clouded the identity of the promoter because it suggested Wheeler was *not* CTI's promoter. Rule 12b-20 requires the disclosure of "further material information, if any, as may be necessary to make the *required statements*, in the light of the circumstances under which they are made not misleading." (emphasis added). Rule 12b-20's reference to "required statements" encompasses Form S-18, since item 15(d) of Form S-18 mandates disclosure of the issuer's promoter. In this case, Rule 12b-20 required disclosure of Wheeler's true relationship with CTI, because that disclosure was "further material information . . . necessary" to make Form S-18 "not misleading."

[17] We next consider whether it was necessary to disclose the contingent liabilities stemming from CTI's and Wheeler's earlier securities law violations. We first note that the Form 10-Q's contained required financial information supplied by CTI's accountants and reviewed by Fehn. That information did not reflect, however, the considerable expo-

sure CTI faced in light of potential private lawsuits arising out of the same set of facts that had led to the 1988 SEC investigation against CTI and Wheeler, the 1989 complaint and injunction against CTI, and Wheeler's conviction. As such, the Form 10-Q's violated the provisions of Rules 10b-5 and 12b-20, which require the disclosure of information where it is "necessary" to make other statements "not misleading."[12]

Fehn contends that the earlier securities law violations did not have to be disclosed because they "did not create any material, contingent financial liabilities." For this proposition, he relies on the Financial Accounting Standards Board's Financial Accounting Standard Number 5 ("FASB 5"), which covers "accounting for contingencies." We reject Fehn's argument for two reasons. First, we note that the standard set forth in FASB 5 requires that "disclosure of the contingency shall be made when there is at least a *reasonable possibility* that a loss . . . may have been incurred." Indeed, FASB 5 specifically covers contingent

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[12]Fehn invokes *United States v. Matthews*, 787 F.2d 38 (2nd Cir. 1986) for the proposition that the absence of a specific regulation requiring disclosure of the two aforementioned items precludes such a disclosure. We disagree. *Matthews* involved the disclosure requirements for proxy statements under Rule 14a-9, 17 C.F.R. § 240.14a-9. In this case, the SEC charged a violation of Rule 10b-5 which we have said "imposes a duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 504 (9th Cir. 1992). That duty is a general one, and arises whenever a disclosed statement would be "misleading" in the absence of the "disclos[ure] of [additional] material facts" needed to make it *not* misleading. *Id.* As we explained above, the information contained in the Form 10-Q's — the mischaracterization of Wheeler's role and of CTI's financial condition — required further disclosures to render them "not misleading."

liability stemming from private litigation, for it provides that:

> an investigation of an enterprise by a governmental agency, if enforcement proceedings have been or are likely to be instituted, is often followed by private claims for redress, and the probability of their assertion and the possibility of loss should be considered in each case.

Fehn mischaracterizes FASB 5 because he insists that FASB 5 requires a "probability" of a contingent event to trigger disclosure.

A more important flaw in Fehn's argument, however, is that it contravenes the securities-law standard for determining the materiality of a corporate event that has not yet occurred. In evaluating the materiality of an event that is "contingent or speculative in nature," *Basic* provides that "materiality 'will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.' " *Basic*, 485 U.S. at 238 (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2nd Cir. 1968) (en banc)). This standard requires an issuer to weigh the likelihood of a potential event and the magnitude of that potential event in determining the materiality of an omission. *Basic*, 485 U.S. at 238-39. Applying this standard here, we conclude that the omissions in this case were material. Although CTI's liabilities were not inevitable, but instead were contingent, they represented a potentially large financial loss for CTI

b. Whether the Disclosure Requirements under Section 10(b) and Section 15(d) Violate the Fifth Amendment Privilege against Self-Incrimination

As an alternate defense to CTI's failure to disclose potential liabilities arising from earlier securities law viola-

tions, Fehn argues that such a disclosure, even if required under the securities laws, would have violated Wheeler's Fifth Amendment privilege against self-incrimination.

We disagree. As the Supreme Court long ago explained, "[w]henever [a court] is confronted with the question of a compelled disclosure that has an incriminating potential," the "[t]ension between the State's demand for disclosures and the protection of the right against self-incrimination" must be resolved by "balancing the public need on the one hand, and the individual claim to constitutional protections on the other." *California v. Byers*, 402 U.S. 424, 427 (1971) (plurality).

A key principle guiding this balancing analysis is that "the *mere possibility* of incrimination is insufficient to defeat the strong policies in favor of [] disclosure." *Id.* (emphasis added). To invoke the privilege against self-incrimination, a claimant must show "that the compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination.' " *Id.* at 429 (quoting *United States v. Sullivan*, 274 U.S. 259 (1927)). A corollary to this principle is that "the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549, 554 (1990).

[18] In determining whether a compelled disclosure threatens self-incrimination, several factors are to be considered: (1) whether the disclosure requirement targets a " 'highly selective group inherently suspect of criminal activities,' " rather than the public generally, *Byers*, 402 U.S. at 430 (citing *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965)); (2) whether the requirement involves " 'an area permeated with criminal statutes,' " rather than 'an essentially noncriminal and regulatory area of inquiry,' " *Id.* (citing *Albertson*, 382 U.S. at 79); and

(3) whether compliance would compel disclosure of information that "would surely prove a significant 'link in a chain' of evidence tending to establish [ ] guilt," *Marchetti v. United States*, 390 U.S. 39, 48 (1968) (citation omitted), rather than disclosing "no inherently illegal activity." *Bouknight*, 493 U.S. at 557 (internal quotations and citations omitted).

We have applied these principles in a variety of contexts, and have accorded them varying emphasis. For example, in *United States v. Flores*, 753 F.2d 1499 (9th Cir. 1985) (en banc), we held that a defendant's Fifth Amendment privilege against self-incrimination was not violated by the Federal Gun Control Act. 18 U.S.C. § 922(e), which required individuals to notify carriers in writing before shipping firearms in interstate or foreign commerce. The defendant, who was convicted under the statute for failure to disclose an international shipment of concealed firearms, argued that the notice requirement violated his Fifth Amendment right against self-incrimination because it would have compelled him to confess a number of criminal acts. Although we acknowledged that the transport of firearms was an activity " 'permeated with criminal statutes,' " *Flores*, 753 F.2d at 1501, we nevertheless concluded that the notice requirement was permissible because it was "not directed at a group of persons 'inherently suspect of criminal activities,' " *id.* (citation omitted), and had a "general regulatory" purpose. *Id.* at 1502.

In deciding *Flores*, we distinguished a line of cases wherein the Supreme Court had struck down various reporting or registration requirements as inconsistent with the privilege against self-incrimination.[13] The common infirmi-

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[13]These cases included *Marchetti v. United States*, 390 U.S. 39 (1968) (striking down statute requiring gamblers to register with the Internal Revenue Service, in light of wide prohibition of gambling); *Grosso v. United States*, 390 U.S. 62 (1968) (overturning conviction for

ties of those statutes, we explained, was that they imposed a disclosure requirement "in an area of activity 'permeated with criminal statutes,' or directed at a group of persons 'inherently suspect of criminal activities.' " and "compliance with [the disclosure] requirements . . . produced an immediate or 'real and appreciable' hazard of self-incrimination due to the fact that the statutes were largely designed to discover . . . involvement in the prohibited activity." *Id.* at 1501: *see also United States v. Des Jardins*, 747 F.2d 499. 508 (9th Cir. 1984) (currency reporting requirement did not violate privilege against self-incrimination; though requirement was not exclusively regulatory in nature, it did not involve a field " 'permeated with criminal statutes,' " was not aimed at a " 'highly selective group inherently suspect of criminal activities.' " and did not require disclosure of inherently illegal activity), *rev'd, in part, on other grounds*, 772 F.2d 578 (9th Cir. 1985).

Although we have not yet applied these principles in the securities regulation context, other lower federal courts have done so. *See Whiteside & Co. v. SEC*, 883 F.2d 7. 1 (5th Cir. 1989) (net capital deficiency reporting requirement did not violate right against self-incrimination of broker-dealer firm or its president because requirement was "regulatory rather than penal."); *United States v. Stirling*, 571 F.2d 708, 728 (2nd Cir.) (defendants not precluded, on grounds of self-incrimination, from being charged with making false statements in registration statement, since registration statement was part of regulatory scheme), *cert. denied*, 439 U.S. 824 (1978); Whiteside & Co. v. SEC, 557 F.2d 1118, 1121

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failure to pay excise tax on gambling): *Haynes v. United States*, 390 U.S. 85 (1968) (striking down statute that required registration of individuals transacting in firearms and that was applied only to weapons used principally by persons engaged in unlawful activities): and *Leary v. United States*, 395 U.S. 6 (1969) (invalidating statute requiring defendant to identify himself as transferee of marijuana who had failed to register and pay an occupational tax).

n.3 (5th Cir. 1977) (SEC regulation requiring broker-dealers to notify the SEC of a failure to make a timely reserve deposit did not violate right against self-incrimination because requirement was regulatory), *cert. denied*, 435 U.S. 942 (1978); *Sloan v. SEC*, 547 F.2d 152, 154 (2nd Cir. 1976) (section of Securities Exchange Act of 1934 requiring brokers to disclose certain information in registration statements was "not criminal but clearly regulatory in nature" and therefore did not infringe on petitioner's privilege against self-incrimination), *cert. denied*, 434 U.S. 821 (1977): *SEC v. Radio Hill Mines Co.*, 479 F.2d 4, 7 (2nd Cir. 1973) (defendant found to have violated antifraud provisions of Securities Act of 1933 and Securities Exchange Act of 1934 could not invoke Fifth Amendment privilege as defense to SEC-initiated injunction compelling him to disclose record of all past transactions).

In *Stirling*, the Second Circuit faced a challenge to a disclosure requirement similar to the one Fehn raises here: the defendant argued that, had he disclosed in the SEC registration statement the nature of various stock transactions with union officials, he might have been admitting facts sufficient to form the basis for criminal prosecution under the Taft-Hartley Act, 29 U.S.C. § 186. For three reasons, the Second Circuit held that the reporting requirements under the Securities Act of 1933 did not violate the defendant's privilege against self-incrimination. First, it declared that "the securities laws are 'essentially noncriminal and regulatory' and that [the disclosure requirement was] essential to the fulfillment of the central purpose of the statutory scheme." *Stirling*, 571 F.2d at 728 (citation omitted). Second, the regulated parties — commercial and investment entities — were not a " 'highly selective group inherently suspect of criminal activities.' " *Id.* Third, the regulated activity — the sale of stock — was inherently lawful. *Id.*

[19] We agree with *Stirling's* analysis of the *Byers* factors as applied in the securities law context. The disclosure requirements contained in Sections 10(b) and 15(d) of the Securities Exchange Act and related regulations do not target a "highly selective group inherently suspect of criminal activities," *Byers*, 402 U.S. at 430 (internal quotations omitted), nor do they regulate an activity that is "permeated with criminal statutes." *Id.* Although disclosure might have revealed past criminal violations *in this case*, the disclosure requirement does not, in general, mandate revelation of "inherently illegal activity." *Bouknight*, 493 U.S. at 557. We therefore conclude that the disclosure requirements in this case did not violate Wheeler's Fifth Amendment privilege against self-incrimination.

c. Scienter of the Primary Violators

[20] Finally, Fehn argues that Wheeler lacked the requisite scienter for commission of the primary violation, for he insists that Wheeler relied on Fehn's professional advice that disclosure of past securities law violations was unnecessary under the regulations and was precluded by the Fifth Amendment privilege against self-incrimination. We disagree. The record reflects that Wheeler adamantly refused to disclose the SEC investigation and the contingent liabilities stemming from past violations. The requisite scienter therefore existed. *See Aaron v. SEC*, 446 U.S. 680, 689-90 (1980) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197-99 (1976)).

2. Fehn's "Substantial Assistance" in the Primary Violation

[21] The term "substantial assistance" has been interpreted to include "participation in the editing" of information for the purpose of marketing securities. *Molecular Technology Corp. v. Valentine*, 925 F.2d 910, 918 (6th Cir. 1991). Fehn admits that he reviewed the initial draft

Form 10-Q prepared by Wheeler's non-lawyer employee, and admits that he personally altered that document. Although he claims to have had less involvement in the preparation of subsequent Form 10-Q's, these documents, too, reflect Fehn's editing notations, and were prepared by Fehn's law firm. Because Fehn had a hand in the editing the Form 10-Q's, and because he failed to properly advise Wheeler and CTI of the material omissions in the Form 10-Q's, instead submitting those forms to the SEC for filing, we conclude that Fehn lent the requisite "substantial assistance" to the primary violation of Section 10(b) and Section 15(d) of the Securities Exchange Act and related regulations.

[22] Fehn urges us that he acted in good faith in rendering professional advice to CTI and Wheeler, and that this alleged good faith precludes a finding that he rendered "substantial assistance" in the primary violations of Sections 10(b) and 15(d). He relies on *In re Carter and Johnson*, [1981] Fed. Sec. L. Rptr. (CCH) ¶ 82,847 (Feb. 28, 1981), in which the SEC explained that "[s]o long as a lawyer is acting in good faith and exerting reasonable efforts to prevent violations of the law by his client, his professional obligations have been met." *Carter*, at ¶¶ 84,172-73. We reject Fehn's argument because we find that his efforts were not "reasonable" in light of the well-established disclosure requirements imposed by the aforementioned SEC regulations. Rules 10b-5, and 12b-20 clearly prohibited the misstatements and omissions contained in CTI's Form 10-Q's.

We observe, furthermore, that effective regulation of the issuance and trading of securities depends, fundamentally, on securities lawyers such as Fehn properly advising their clients of the disclosure requirements and other relevant provisions of the securities regulations. Securities regulation in this country is premised on open disclosure, and it is

therefore incumbent upon practitioners like Fehn to be highly familiar with the disclosure requirements and to insist that their clients comply with them.

We acknowledge the inherent tension between representing a client in criminal or civil litigation — which entails professional obligations such as the duty of confidentiality and the need to advise clients of their privilege against self-incrimination — and counseling a client in connection with regulatory compliance. Commentators have described the tension that arises where a lawyer is called upon to perform a "legal audit" of his own client, such as when a lawyer advises an issuer of securities about the need to disclose certain negative corporate information:

> What is unusual about such employment, of course, is that the client has in effect hired the lawyer for the very purpose of revealing information that otherwise would be confidential.

Geoffrey C. Hazard, Jr. & W. William Hodes, 1 *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 2.3, at 101 (Aspen Law & Business, 2nd ed. 1990).

This dilemma is especially pronounced in cases where, as here, a lawyer attempts to represent a client in an SEC investigation of previous disclosure violations and, at the same time, attempts to advise that same client as to ongoing disclosure requirements. We note that ABA Model Rule of Professional Conduct 2.3 makes a special provision for cases where a lawyer is asked by a client to evaluate that client's internal information for the use of an outside party, such as a government agency. Model Rule 2.3(a)(1) provides that

> [a] lawyer *may undertake an evaluation* of a matter affecting a client for the use of someone other than the client *if . . . the lawyer reasonably believes that making*

> *the evaluation is compatible* with other aspects of the lawyer's relationship with the client. (emphasis added)

In offering an example of the practical implications that flow from this requirement, the Comment to Model Rule 2.3 cautions that

> [I]f the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction.

We express no opinion as to whether Fehn's representation of Wheeler and CTI in connection with the SEC investigation was "compatible" with counseling these same parties about compliance with SEC disclosure requirements. What *is* clear, however, is that the SEC disclosure requirements mandated disclosure of Wheeler's role as CTI's promoter and of the contingent liabilities stemming from CTI's and Wheeler's earlier securities law violations. In failing to make the Form 10-Q's comply with these disclosure requirements, Fehn substantially assist[ed]" in the primary disclosure violations.

3. Fehn's Scienter in Aiding and Abetting the Primary Violation

The new Section 104, in authorizing SEC injunctive actions against aiders and abettors, of the securities laws, makes clear that the requisite scienter for aiding and abetting liability is "knowingly." This requirement is in keeping with the traditional scienter necessary to give rise to aiding and abetting liability under Section 10(b). *See Hauser*, 14 F.3d at 1343 (requiring "actual knowledge" of the primary wrong and of the aider and abettor's "role in furthering [that violation]").

[23] Fehn's knowledge of the primary violations was plainly established in this case. First, Fehn knew that the representations in CTI's registration statement with respect to Wheeler's role as promoter were inaccurate. In light of the information Fehn possessed when he undertook to review and edit the Form 10-Q's, Fehn must have known that the Form 10-Q's he helped to prepare perpetuated this inaccuracy and, furthermore, contained additional untrue statements about Wheeler's historical relationship with CTI. Second, Fehn knew there was material information about CTI that Wheeler did not wish to disclose in the quarterly Form 10-Q reports, since Wheeler informed Fehn in no uncertain terms of his refusal to disclose in the Form 10-Q's his potential liability for past securities law violations. The "knowledge" element was therefore clearly established in this case.

III. The Entry of the Permanent Injunction against Fehn

Fehn's final challenge to the permanent injunction is that the district court abused its discretion in entering a permanent injunction against him because it erroneously failed to consider facts relevant to the propriety of a permanent injunction.

The granting or denying of injunctive relief "rests within the sound discretion of the trial court." *SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 465 (9th Cir. 1985) (citing *SEC v. Arthur Young & Co.*, 590 F.2d 785, 787 (9th Cir. 1979)). A district court's grant of permanent injunctive relief is therefore reviewed for an abuse of discretion or application of an erroneous legal principle. *United States v. Yacoubian*, 24 F.3d 1, 3 (9th Cir. 1995).

[24] We first consider what factors we must examine in evaluating the propriety of the district court's decision to permanently enjoin Fehn from the future aiding and abetting of violations of Sections 10(b) and 15(d) of the

Securities Exchange Act. Before Congress enacted Section 104 of the Private Securities Litigation Reform Act, we followed the standard outlined in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980). We conclude that this standard remains appropriate in the context of Section 104, since we can find no indication that Congress, in enacting Section 104, intended to vary the pre-*Central Bank* standard for injunctive actions.

To obtain a permanent injunction, the SEC "had the burden of showing there was a reasonable likelihood of future violations of the securities laws." *Id.* at 655 (citations omitted). We acknowledge that there is "[n]o per se rule requiring the issuance of an injunction upon the showing of [a] past violation," *SEC v. Koracorp Indus., Inc.*, 575 F.2d 692 (9th Cir.), *cert. denied*, 439 U.S. 953 (1978), but, as we explained in *Murphy*, "[t]he existence of past violations may give rise to an inference that there will be future violations; and the fact that the defendant is currently complying with the securities laws does not preclude an injunction." *Murphy*, 626 F.2d at 655.

In "predicting the likelihood of future violations," we must assess "the totality of the circumstances surrounding the defendant and his violations," and we consider such factors as

> (1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction; (3) the defendant's recognition of the wrongful nature of his conduct; (4) the likelihood, because of defendant's professional occupation, that future violations might occur, (5) and the sincerity of his assurances against future violations.

Id. (citations omitted).

[25] Applying these factors to this case, we conclude that the evidence was adequate to support the permanent injunction issued by the district court. Although the second factor

weighs in Fehn's favor, since the SEC cites no other securities law violations on Fehn's part, other factors weigh against him. First, it was established at trial that Fehn aided and abetted violations of key antifraud and disclosure provisions of the Securities Exchange Act. Second, as discussed above, the SEC established that Fehn possessed the requisite knowledge to aid and abet the primary violations by CTI and Wheeler. Although Fehn denies, and the SEC does not allege, that he intended to defraud investors, that degree of scienter is not necessary to prove aiding and abetting. Third, Fehn's lack of remorse is apparent in his continued insistence on the validity of his advice to Wheeler with respect to the scope of the Fifth Amendment privilege. Fourth, Fehn's professional occupation tends to suggest a risk of future violations, since a significant portion of his past practice involved representing clients in connection with the Securities Exchange Act of 1934. Finally, the sincerity of Fehn's assurances against future violations is difficult to gauge, but we note that sincere assurances of an intent to refrain from aiding and abetting future violations are insufficient, without more, to militate against an injunction. *Id.* at 656.

Based on our consideration of the relevant factors, we conclude that the district court did not abuse its discretion in permanently enjoining Fehn from future violations. Although Fehn has foresworn future violations, in our view, other factors ultimately weigh in favor of the injunction entered below.

CONCLUSION

We affirm the district court's final judgment against Fehn and its order permanently enjoining Fehn from future aiding and abetting of violations of Sections 10(b) and 15(d) of the Securities Exchange Act of 1934 and related regulations.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEAL FILED FOR THE NINTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

H. THOMAS FEHN,
Defendant-Appellant.

No. 94-16136
D.C. No.
CV-92-00946-HDM
(District of Nevada)

ORDER

Before: GOODWIN and HAWKINS, Circuit Judges, and FITZGERALD,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SECURITIES AND EXCHANGE COMMISSION
Plaintiff,
VS.
H. THOMAS FEHN, ET AL,
Defendants

BY JULIE RIVERA
CV-S-92-946-HDM(RLH)
FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND FINAL JUDGMENT AND ORDER OF PERMANENT INJUNCTION

This is an action for a permanent injunction brought by the plaintiff, Securities and Exchange Commission ("S.E.C.") against H. Thomas Fehn. Plaintiff seeks the entry of a permanent injunction pursuant to Sections 20(b) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77t(b), and Sections 21(d) and (e) of the Securities Exchange Act of 1934 ("Exchange Act") 15 U.S.C. §§ 78u(d) and (e).

The defendant Fehn ("Fehn"), an attorney, is charged with aiding and abetting violations of the federal Securities Laws by CTI Technical, Inc. ("CTI") and Edwin "Bud" Wheeler ("Bud Wheeler"). The Plaintiff alleges that Fehn aided and abetted the violations by CTI and Bud wheeler of the anti-fraud and reporting provisions of the federal Securities Laws contained in sections 10(b) and 15(d) and 23(a) of the Exchange Act 15 U.S.C. §§ 78j(b), 78o(d) and 78w(a) and rules promulgated thereunder Rules 10-5, 15d-13 and 12b-20 [17 C.F.R. § 240 10b-5, 15d-13 and 12b-20] by drafting and filing with the commission periodic reports on behalf of CTI which he knew, or was reckless in not knowing, were false and misleading.

Fehn contends that there was no primary violation of the Exchange Act by either Wheeler or CTI in connection with the filing of CTI's periodic reports. He argues that the information that plaintiff contends was omitted from those reports was either not required to be included in the reports by any law or regulation of the S.E.C., or it was not material at the time the reports were filed; and if CTI and Wheeler were required, by law or regulation, to disclose in the periodic reports that there had been a prior violation of law by them (in connection with CTI's initial public offering ("IPO"), that such law or regulation would be an unconstitutional violation of their Fifth Amendment rights against self-incrimination.

Finally, Fehn argues that since there was no violation of the law by Wheeler and CTI in connection with the filing of periodic reports, he, Fehn, cannot be liable as an aider or abetter.

This Court has jurisdiction over this action pursuant to section 22(a) of the Securities Act [15 U.S.C. § 77u(a)] and Sections 21(e) and 27 of the Exchange Act (15 U.S.C. §§ 78u(e) and 78aa.

The following facts are admitted by the parties and required no further proof:

A. DEFENDANT FEHN

1. The Commission, pursuant to the authority granted to it by Sections 10(b), 15(d) and 23(a) of the Exchange Act [15 U.S.C. §§ 78j(b), 78o(d) and 78w(a)], has promulgated rules 10b-5, 12b-20 and 15d-13 [17 C.F.R. §§ 240.10b-5, 240.12b-20 and 240.15d-13], which were in effect at all times relevant to this Complaint and which are still in effect.

2. In connection with the transactions, act, practices, and course of business described in this Complaint, the defendant, directly and indirectly, has made use of the means and instrumentalities of interstate commerce, of the mails, and of the means and instrumentalities of transportation and communication in interstate commerce.

3. Certain of the transactions, acts, practices and courses of business constituting the violations of law alleged herein occurred within this judicial district.

4. Defendant Fehn resides in Los Angeles, California. He is licensed to practice law in California by the Supreme Court of the State of California. Fehn participated in the drafting and preparation of three periodic reports on Forms 10-Q for CTI, and further participated in filing the periodic reports on Forms 10-Q with the plaintiff Commission. The CTI quarterly report for the period ended March 31, 1988, was filed in or about August 1988. The CTI quarterly reports for the periods ending December 31, 1987 and June 30, 1988, were filed in or about November 1988.

5. CTI was incorporated in Nevada in January 1987. Its last know principal office was located at 3900 Paradise Road, Las Vegas, Nevada. In connection with its blind pool initial public offering, in or about June 1987, CTI filed its initial Registration Statement on Form S-18 with the plaintiff Commission to register 20,000,000 securities units. Each securities unit consisted of one share of common stock and nine detachable warrants to purchase additional shares of common stock for three cents per share. This Registration Statement related to a self-underwritten (i.e. not involving an underwriter) offering by CTI. This Registration Statement went effective on August 24, 1987. In or about August 1987, CTI filed a second

Registration Statement on Form S-18 with the plaintiff Commission which was substantially identical to the June 1987 Registration Statement except that it disclosed the appointment of Stoneridge Securities, Inc. ("Stoneridge") as underwriter and sought to register a total of 22,000,000 securities units, 2,000,000 of which were to be issued to Stoneridge as compensation. The August Registration Statement on Form S-18 became effective on September 23, 1987. CTI common stock and warrants were publicly quoted in the National Daily Quotations Service's "Pink Sheet."

6. On September 29, 1987, the initial distribution of CTI units was completed.

7. The proceeds from the CTI initial public offering were wire transferred from Ameritrade, Inc., the clearing firm for Stoneridge Securities, Inc., to the CTI escrow account at Continental National Bank, Las Vegas, Nevada, account number 0102022704. Michelle Brazier opened the account at Continental National Bank.

8. Beginning on September 29, 1987, Ms. Brazier issued checks drawn on the escrow account including: $26,000 to Stoneridge Securities, Inc.; $30,000 to American Development & Management Co.; $5,000 to Continental National Bank and the remaining $139, 000 of the CTI Technical, Inc. offering proceeds to Bud Wheeler.

9. Bud Wheeler deposited the $139,000 in offering proceeds in CTI's account at the Continental National Bank, Las Vegas, Nevada account number 102025371. Signatories on the account were Jennie Orrell, mother of Bud Wheeler, and Kent Midby (Midby).

10. In October through December of 1987, CTI issued checks drawn on account number 102025371 including: checks in excess of $118, 000 directly to, or on behalf of American Development & Management Co. Those checks were signed by Jennie Orrell.

11. American Development and Management Co. was a company owned and controlled by Bud Wheeler. Bud Wheeler also owned and controlled Desert T.V. and Appliance and UMK Consolidated Investors.

12. Bud Wheeler is a resident of Las Vegas, Nevada. Bud Wheeler was the promoter behind CTI and was responsible for its incorporation in January 1987.

13. From January 1987 to August 1988, the date that Bud Wheeler's election as president of CTI was first disclosed publicly, Bud Wheeler had no publicly disclosed affiliation as an officer, director, shareholder, founder or control person of CTI.

14. Ronald D. Wheeler ("Ron Wheeler") is a resident of Las Vegas, Nevada. Ron Wheeler and Bud Wheeler are brothers. Ron Wheeler was the founder and president of Stoneridge until it ceased operations in February of 1988.

15. During the period from at least September 1987 through all time relevant, Fehn served as counsel to Stoneridge Securities, Inc., the underwriter for CTI's initial public offering of securities units. Fehn, in his capacity as counsel for Stoneridge, reviewed the CTI Registration Statement on Form S-18 and knew of the representations contained therein.

16. In or about October or November 1987, Fehn knew that CTI's Registration Statement had become effective, that CTI's securities units had not been registered for sale in any state, and that purchases and sales of CTI's securities units, consisting of common

stock and warrants, had occurred in states in which they had not been registered for sale (i.e. that the offering had not been "blue skyed"). Fehn also knew, in October or November of 1987, that rescission by CTI was not possible because the offering proceeds had been spent.

17. In November 1987, Fehn became counsel for CTI, Bud Wheeler and others, in connection with a private investigation conducted by the plaintiff commission to determine whether CTI and others had violated the federal Securities Laws. Fehn also represented Stoneridge Securities, Inc. and its officers and certain employees. In connection with his representation of CTI, its officers, directors, employees and agents, and Stoneridge Securities, Fehn was present when the following persons testified, under oath, to the staff of the Commission: Marnell Binkley, C. Donald Dorsey, Brenda Kross, Midby, Timothy B. Mobley, Bud Wheeler, Ron Wheeler, and Ronald D. Wheeler, Jr.,

18. Fehn is 50 years old

19. Fehn was admitted to the bar in 1969.

20. Fehn has given securities law seminars.

21. Fehn's practice has always been concentrated in securities related matters.

The following facts, though not admitted, will not be contested at trial evidence to the contrary:

A. DEFENDANT FEHN

1. On September 18, 1989, in *Securities and Exchange Commission v. Stoneridge Securities, et al.*, the United States District Court for the District of Nevada entered a Final Judgment of Permanent Injunction, with Findings of Fact and Conclusions of Law, against CTI finding that it had violated the federal Securities Laws and enjoining it from, among other things, further violations of Sections 5(b), 6 and 17 (a) of the Securities Act [15 U.S.C. § 77e(b), 77f and 77q(a)] and Sections 10(b) and 15(d) of the Exchange Act (15 U.S.C. §§ 78j(b) and 78o, (d)] and Rules 10b-5, 12b-20, 15d-1, 15d-11 and 15d-13 thereunder (17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.15d-1, 240.15d-11 and 240.15d-13].

2. On September 18, 1989, in *Securities and Exchange Commission v. Stoneridge Securities, et al.*, the United States District Court for the District of Nevada entered a Final Judgment and Permanent Injunction, with Findings of Fact and Conclusions of Law, against Bud Wheeler finding that he had violated the federal Securities Laws and enjoining him from, among other things, further violations of Sections 5(b), 6 and 17(a) of the Securities Act [15 U.S.C. §§ 77e(b), 77f and 77q(a)] and Sections 10(b) of the Exchange Act [15 U.S.C. §§ 78j(b)] and Rule 10b-5, thereunder [17 C.F.R. § 240.10b-5], and from aiding and abetting violations of Sections 15(d) of the Exchange [15 U.S.C. § 78o(d)] and Rules 15d-1, 15d-11 and 15d-13 thereunder [17 C.F.R. §§ 240.15d-1, 240.15d-11 and 240.15d-13].

3. On September 23, 1992, Bud Wheeler was indicted on one count of securities fraud in connection with his role in the fraudulent initial public offering of CTI Technical, Inc. That indictment charged that Bud Wheeler controlled CTI and engaged in a scheme to defraud purchasers of CTI securities. That indictment also charged that the CTI Registration Statement, among other things, failed to disclose the figurehead role of the named officers and directors of CTI and failed to disclose that Bud Wheeler actually controlled CTI. On May 18, 1993, Bud Wheeler was convicted for his criminal violation of Section 17(a) of the Securities Act of 1933. In July 1993, Bud Wheeler was sentenced to 18 months in prison.

At trial, before this Court plaintiff proved:

1. Prior to the filing of the CTI quarterly reports Fehn had actual knowledge, among other things, that Bud Wheeler was the undisclosed promoter and control person of CTI, that the purported officers and directors were mere figureheads who had not capitalized the company, and they had not approved the various corporate acts of CTI, had not signed the Registration Statement and that Bud Wheeler controlled the CTI offering proceeds. None of these facts were disclosed in the CTI Form 10-Qs which Fehn assisted in preparing and which he filed with the Commission.

2. Prior to the filing of the CTI quarterly reports, Fehn also had knowledge, through the inventory records of Stoneridge which were identified by his client, Timothy Mobley, an assistant trader at Stoneridge Securities, of the plan of Bud Wheeler and Stoneridge to offer CTI units consisting of one share of CTI common stock and nine warrants to purchase CTI common stock for 1 cent per unit, immediately

purchase the units back for 2 cents per unit, strip the warrants from the units to keep for themselves and resell the shares of CTI common stock only to the public for 4 cents per share.

3. The stock of CTI was traded before and after the filing, by Fehn an behalf of CTI, of the three CTI quarterly reports on Forms 10-Q.

4. Fehn admits that he was aware that the three CTI quarterly reports on Forms 10-Qs, which he substantially assisted in drafting, editing, reviewing, revising and filing, were incomplete and did not contain all the information necessary to make the statements made not misleading.

5. Fehn's firm has done substantial work in the registration area of Securities Laws and the filing of quarterly and annual reports by public companies and intends to continue doing such work.

TRIAL TESTIMONY

Defendant Fehn, admitted at trial that he first became aware during the S.E.C. investigative hearing that his client CTI had not filed required form 10-Q quarterly reports with the Commission.[1] He also testified that counsel for the

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[1] Rule 15d-13 provides impertinent part:

(a) ... every issuer that has securities registered pursuant to the Securities Act of 1933 is required to file annual reports pursuant to section 15(d) of the Securities Exchange Act of 1934 on Form 10-K ... shall file a quarterly report on Form 10-Q for each of the first three quarters of each fiscal year of the issuer, commencing with ... the first fiscal quarter reported upon in the registration statement. ...

Section 15(d) of the Exchange Act provides, in pertinent part:

(d) ... issuer which shall ... file a Registration Statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with

S.E.C., Gregory F. Von Shaumberg, had discussed with him during a recess in the investigative hearings the necessity for filing the quarterly reports. This conversation was on June 20, 1988 when, Fehn testified, he first learned that the Food and Drug Administration had banned the sale of "a patch to control weight" which was the principle product of CTI.

Fehn testified he told Mr. Von Shaumberg that he, Fehn, would see that the 10-Qs were filed. He then had a conference with Bud Wheeler and told him the failure to file 10-Qs was a "disclosure problem." Wheeler said he knew nothing about such forms. Fehn then explained the process to Wheeler and gave Wheeler S.E.C. booklets concerning the filings.

Around the end of July 1988 Wheeler brought Fehn a 10-Q form for the period ending March 31, 1988. The witness testified he read it and discussed matters that should be disclosed with Wheeler. Wheeler stated he had no interest in disclosing any information.

Fehn, testified he believed Wheeler had criminal exposure and he advised Wheeler to take the Fifth Amendment. Fehn, stated that even though he then knew the Registration Statement failed to disclose Wheeler's role in CTI, he believed that under the holding of *U.S. Matthews*, 787 F.2d 38 (2nd Cir. 1986), compelling disclosure of an uncharged

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> such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 13 of this title in respect of a security registered pursuant to section 12 of this title. . . .

CTI registered its securities for sale under the Securities Act of 1933 by the filing with the Commission its Registration Statements on Form S-18. Accordingly, CTI was required to file periodic reports for the first three quarters following its initial public offering on Form 10-Q, as provided by Section 13 of the Exchange Act and the rules thereunder.

violation of the law would violate his clients' Fifth Amendment rights and in any event the question of whether a '33 Act violation (failure to disclose Wheeler's role in the Registration Statement) must be disclosed in '34 Act reports (the 10-Qs) is indeed an legal requirement.

Counsel argued that if Fehn reasonably believed at the time the 10-Q reports were filed that the failure to disclose a material fact in the Registration Statement need not be disclosed in the 10-Q report, Fehn could not have had knowledge of the primary violation and thus, could not have aided and abetted it.

DISCUSSION

Counsel stated in his memorandum of Points and Authorities in opposition to plaintiff's Motion for Summary Judgment (Document #31) at p. 4:

> . . . . plaintiff contends that there was a legally recognizable duty on CTI to disclose in its '34 Act periodic reports the '33 Act violations which had previously been committed. Plaintiff cites no support for this proposition other than its own conclusory pleading. If there is no such requirement for CTI to disclose its '33 Act violations, then no primary violation of the '34 Act has occurred. If no violation exists, no aiding and abetting liability can follow. . . . Moreover, even if there were a requirement to disclose an uncharged prior violation of the law, such a requirement would violate the constitutional privilege against self-incrimination. (*See U.S. v. Matthews*, 787 F.2d 38 (2nd Cir. 1986).

This opinion will consider first, whether there is a legally cognizable duty to disclose in a 10-Q report a misleading statement made in the corporation Registration Statement, then we will discuss the applicability of *U.S. v. Matthews* to the Fifth Amendment assertion of Wheeler and CTI.

I.

Duty to Disclose

The intent of Congress in enacting the 1934 Exchange Act was to establish a Commission with rule making powers to monitor participants in the equity securities markets. In keeping with the self-regulating nature of market participants, Congress enacted 15 U.S.C. § 78j(b) and the Commission promulgated thereunder Rule 10b-5 (17 C.F.R. § 240 10b-5). Rule 10b-5. as it is customarily called, is straight forward in its command. It states in pertinent part:

It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails . . . .

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the sale of any security.

The complaint in this action charges in Count V:

During the period from at least August 1988, CTI violated Section 15 (d) of the Exchange Act and Rule 15d-13 thereunder by filing with the plaintiff Commission periodic reports on forms 10-Q for the quarters ended December 31, 1987, March 31, 1988 and June 30, 1988 which contained untrue statements of material fact and omitted to state material facts, necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading . . . .

The complaint alleges in substance that in connection with the offer, purchase and sale of securities units, common stocks and warrants of CTI, Bud Wheeler devised a scheme to defraud by organizing, incorporating, and administering the affairs of CTI in connection with the public offering of its securities.

The scheme described is the filing of Registration Statements on forms S-18 with the Commission. The Registration Statements were distributed to investors, prospective investors and the general public. The Registration Statements, it is charged, omitted to state the role of Bud Wheeler in the formation and management of CTI, the role of the other officers and directors in management; and the source of the initial capitalization of CTI.

The Complaint alleges that defendant Fehn, as counsel to CTI, its officers and directors knew of the material omissions and misstatements in the Registration Statements. In August 1988, Fehn substantially assisted Bud Wheeler's and CTI's preparation and filing with the Commission and public dissemination of a periodic report on form 10-Q for the quarter ended March 31, 1988. That report omitted to state the roles of Bud Wheeler, the directors and the officers in the formation and management of CTI, Wheeler's control over the common stock and warrants of CTI, and the material contingent liabilities of CTI. The complaint also alleges the same participation by defendant Fehn and the same deficiencies in forms 10-Q submitted in November 1988, for the quarters ending December 31, 1987 and June 30, 1988.

It is difficult for this Court to credibly accept defendant's argument that the forms 10-Q did not legally require that the omissions and misstatements made in the Registration Statement, of which he was aware, be corrected. This is especially difficult in light of Mr. Fehn's testimony that he has been an attorney since 1969, his firm has done substan-

tial work in the registration area of Securities Law; his primary practice is in the field of Securities Law and he is recognized as an expert in the area in that he conducts seminars on Securities Law.

Section 15(d) [15 U.S.C. 78o(d)] of the Exchange Act requires that public companies file periodic reports in accordance with Commission rules and regulations.

Rule 12b-20 [17 C.F.R. 240 12b-20] promulgated pursuant to section 15(d) provides:

> In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.

Rule 10b-5, cited above, makes it unlawful to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

The Ninth Circuit has recognized the applicability of Rule 10b-5 to S.E.C. reporting requirements in *Hanon v. Dataproducts Corp.*, 976 F.2d 497 (9th Cir. 1992). The *Hanon* court first cited the general rule:

> [A]n issuer's public statements cannot be analyzed in complete isolation, *In re Convergent Technologies v. S.E.C. Litig*, 948 F.2d 507, 512 (9th Cir. 1991). In order to survive summary judgment, Hanon must demonstrate that a particular statement, when read in light of all the information then available to the market, or a failure to disclose particular information, conveyed a false or misleading impression. *Id.*[2]

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[2] *Hanon v. Dataproducts Corp.*, 976 F.2d 501.

In response to the company's claim that it was not required to disclose in its annual report (10-K) technical problems with its product the Court stated:

> We reject this argument. Denigrating or not, Rule 10b-5 imposes a duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered not misleading *See* 17 C.F.R. § 240 10b-5.[3]

Reading the statute and rules together it is inescapable that a person who files a required report (Form 10-Q] and at the time of reporting has knowledge that the required Registration Statement [Form S-18] omits information specifically required to be reported[4] and for the first time mentions the name of Bud Wheeler (the promoter) as a person recently elected as Chief Executive Officer of and former consultant to the corporation[5] without disclosing that

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[3] *Id.* at p. 504.

[4] Item 15 of Form S-18 required the following information to be included in CTI's registration statement:

Section 15(d):

(a) State the names of the promoters, the nature and amount of anything of value (including money, property, contracts, options or rights of any kind) received or to be received by each promoter directly or indirectly from the registrant, and the nature and amount of any assets, services or other consideration therefor received or to be received by the registrant. The term "promoter" is defined in Rule 405 under the Act.

Rule 405 of Regulation C [17 C.F.R. 230.405] defines promoter as, among other things, "[a]ny person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer . . ." Bud Wheeler was a promoter of CTI.

[5] Form 10-Q paragraph 5 for the period ending March 1988 stated:

On February 1, 1988, Edwin "Bud" Wheeler was named Chief Executive Officer of the company. Bud Wheeler is also the president of a management and development firm who performed consulting services to the company.

Wheeler's role as promotor was omitted from the Registration Statement, has failed to comply with Rules 10b-5 and 12b-20. Both of these rules require that, one making a required report shall add such further material information as may be necessary to make the former required statements not misleading. Implicit in the requirement to file periodic reports and explicit in the rules is the notion that the information, when filed, be correct. If it was not correct when filed, then to prevent misleading investors, the incorrect information must be corrected in a subsequent required report. I find that the March 31, 1988 10-Q is misleading when it implies that Wheeler performed consulting services to the company when Fehn, at that time knew that Wheeler was the organizer, promoter and controller of the company.[6]

The Supreme Court "repeatedly has described the fundamental purpose of the [Exchange] Act as implementing a philosophy of full disclosure . . ." *Santa Fe industries, Inc. v. Green*, 430 U.S. 462, 477-488 (1977). Provided with full and honest disclosure, investors and prospective investors can make informed decisions regarding securities.

In this case the fraud on the market occurred because the false and misleading Registration Statement was the only public information available in the market place in which CTI was being traded during the approximate nine months between the CTI initial public offering and the filing of the March 31, 1988 from 10-Q. *Basic v. Levinson*, 485 U.S. 224 (1988).

This Court finds that the full disclosure scheme of the Securities Laws required Fehn, as counsel to CTI to inform the investing public in the March 1988 10-Q of the informa-

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[6]Although this opinion focuses on the failure of Fehn to disclose Wheeler's actual role in the corporation in the form 10-Q, the opinion is equally applicable to other failures to disclose, of which Fehn was aware at the time he assisted in the preparation and filing of the reports.

tion he then had concerning the role of Bud Wheeler and not mislead the investors by describing Wheeler as a former consultant. In substantially assisting in the filing of a required document that failed to adequately describe Wheeler, Fehn aided and abetted CTI in violating the anti-fraud and reporting regulations of the S.E.C.

In order to find liability for aiding and abetting under Section 17(a) of the Securities Act or Section 10(b) of the Exchange Act and rule 10b-5 thereunder the plaintiff must prove the following three elements:

1. The existence of an independent primary wrong;

2. Actual knowledge by the alleged aider and abettor of the wrong; and

3. Substantial assistance by the aider and abettor in the wrong. *Newton v. Univest Financial Corp.*, 802 F. Supp. 346 (D. Nev. 1990). *Durham v. Kelly*, 810 F.2d 1500, 1505 (9th Cir. 1987).

1.

The Existence of an Independent Primary Wrong

This element has been proven by a preponderance of the evidence. Plaintiff has introduced evidence of the testimony of the members of the Board of Directors of CTI given during the S.E.C. investigative hearings; the final judgments of permanent injunction against CTI and Bud Wheeler in this Court on September 18, 1989; the certificate of conviction of Bud Wheeler based on one count of securities fraud in connection with his role in the fraudulent initial public offering of CTI and facts admitted by the parties in the Pretrial Order set forth in paragraph 5 through 13 recited above at pp. 3-6.

2.

Actual Knowledge by the Alleged
Aider and Abettor of the Wrong

This element has been proven by a preponderance of the evidence through the trial testimony of Mr. Fehn;[7] his admission of uncontested facts 15 through 17 recited in the Pre-trial Order and set forth above at pp. 6-7 and the testimony of the officers and agents of CTI given at the S.E.C. investigative hearings when Fehn was present.

3.

Substantial Assistance by the
Aider and Abettor In the Wrong

This element has been proven by a preponderance of evidence through the testimony of Fehn at trial and the admission of uncontested fact 4 recited in the Pre-trial Order and set forth above at p. 3.

The conclusion that Fehn aided and abetted violations of the Securities Laws by Wheeler and CTI are based upon the following findings of fact:

1. When CTI filed its Registration Statements with the Commission no mention was made therein of the fact that Wheeler was the promoter, organizer and operator of all the corporations significant activities. Fehn as attorney for the underwriter had reviewed this document and is charged with knowledge that Wheeler was not mentioned. This omission, though

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[7] "When a lawyer . . . concludes that his client's disclosures are not adequate to comply with the law and so advises his client, he is "aware" in a literal sense, of a continuing violations of the securities laws." *In Re Carter*, S.E.C. Release No. 34-17597. Adm. Proc. File No. 3-5464, February 28, 1981 at p. 84, 171. Fehn testified he advised Wheeler that he had disclosure problems.

not attributable to Fehn, was a violation of Rule 240 10b-5 and;

2. Fehn, knowing of the activities of Wheeler and knowing they were not revealed in the Registration Statements, substantially assisted in the preparation of the March 31, 1988, June 31, 1988 and September 31, 1988 10-Q reports which failed to correct the omission in the Registration Statement.

3. Fehn, as an attorney practicing in the field of securities law knew or closed his eyes to that which should have been obvious to a professional of his experience,[8] that neither Wheeler or CTI had a Fifth Amendment privilege to resist disclosure of Wheeler's activities, yet he advised his clients of such privilege and substantially aided in preparing and filing misleading reports with the Commission.

II.

Are the Disclosure Requirements Violations of the Fifth Amendment?

Defendant Fehn, testified that he advised Wheeler that he could resist disclosure because of the Fifth Amendment privilege. Defendant relies heavily on *U.S. v. Matthews*, 787 F.2d 38 (2nd Cir. 1986). Certain important distinctions must be made. Fehn represented not only Bud Wheeler but the corporation CTI. Although it is undoubtedly true that an individual can, under proper circumstances, invoke the Fifth Amendment privilege, *Curcio v. United States*, 354, U.S. 118 (1957), a corporation, even a single stockholder corporation, cannot invoke the Fifth Amendment *United States v.*

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[8] *Spectrum Financial Cos. v. Marconsult. Inc.*, 608 F.2d 377, 381 (9th Cir. 1979); *Nelson v. O. E. Servwold*, 576 F.2d, 332, 1338 (9th Cir.) *cert denied*, 439 U.S. 970 (1978).

Richardson, 469 F.2d 349 (10th Cir. 1972); *Wilson v. United States*, 221 U.S. 361 (1911). It is to be remembered that the defendant Fehn was engaged in filing the CTI quarterly reports and as to CTI there was no privilege against self-incrimination.

Fehn's reliance on *U.S. v. Matthews* is misplaced, *Matthews* was a criminal case involving the disclosure requirements of Section 14(a) of the Exchange Act in which it was charged that Matthews, a candidate for re-election to the Board of Directors of a corporation, failed to reveal in his proxy statement an uncharged prior violation of the law.

The Circuit in *Matthews* takes great pains to set forth certain principles. First, it is noted, that Congress delegated to the S.E.C. the primary responsibility for seeing to the enforcement of the federal Securities Laws. The congressional intention was to give the Commission complete discretion to require in corporate reports only such information as the S.E.C. deems necessary or appropriate in the public interest to protect investors. The Court then turned to the Commission's rules to determine what disclosures were required in Proxy Statements. It noted that the Commission adopted a rule providing for disclosure only of criminal convictions or pending criminal proceedings in Proxy Statements concerning a corporate candidate's integrity. The Court cited to *GAF Corp v. Heyman*, 724 F.2d 727, 740 (2nd Cir. 1983) in which it emphasized that the Commissions's rules do not require a candidate for election to accuse himself of antisocial or illegal activities and noted that the Ninth Circuit is in accord, *Gaines v. Haughton*, 645 F.2d 761, 779 (9th Cir. 1981), *cert denied.*, 454 U.S. 1145 (1982). The Court concluded that uncharged prior misconduct was not material or otherwise not within the ambit of federal Securities Laws with one important *caveat*, so long as the uncharged criminal conduct *is not required to be disclosed* [Emphasis mine) by any rule lawfully promul-

gated by the S.E.C.[9] This observation should have alerted Mr. Fehn that he was dealing with a situation specifically excepted by the Court from the *Matthews* rule.

As this Court has written in Part I of this opinion, the specific rules of the S.E.C. require corporations dealing in securities offered to the public to file Registration Statements and Quarterly Reports. Such required filings have been termed by Courts dealing with such documents and a claim of Fifth Amendment privilege as "The Required Documents Rule."

This rule may be simply stated: it arises in the context of a person who invokes the privilege of self incrimination as a defense to complying with a requirement, imposed by law, to furnish certain information, either in testimony or documents. The invocation of the privilege in this context requires an inquiry into whether the public need for the information outweighs "the individual claim to constitutional protection." *California v. Byers*, 402 U.S. 424, 427 (1971). It depends on the facts in each case whether the privilege is sustained or rejected, however there is a common thread running through the cases. Where the compulsion to produce is bottomed in a legal requirement to disclose there is no Fifth Amendment privilege to assert. The application of this rule was most recently discussed by the Supreme Court in *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990) in which the Court observed that the fact that the requirement to produce will compel testimonial assertions that may prove incriminating,

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[9] "At least so long as uncharged criminal conduct is not required to be disclosed by any rule lawfully promulgated by the Securities Exchange Commission, nondisclosure of such conduct cannot be the basis of a criminal prosecution" *United States v. Matthews*, 787 F.2d at p.1.

does not, in all contexts, justify invoking the privilege. The Court explained:

> The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory scheme construed to effect the State's public purposes unrelated to the enforcement of its criminal laws. . . . No Fifth Amendment protection attached to production of the 'required records,' which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection."[10]

The Court quoted *Wilson v. United States*, 221 U.S. 361, 382 (1911) for the rationale behind the required records exception:

> [W]here by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.

There can be no question that the regulatory scheme of the S.E.C. is non-criminal in nature. The record keeping and reporting regulations were enacted for the purpose of protecting public investors participating in the securities markets. Wheeler, Chief Executive Officer of CTI and custodian of its books and records, had no Fifth Amendment privilege to refuse disclosure in the quarterly reports of his activities revealed in those books and records of the corporation, even though those activities would incriminate him. The defendant Fehn, acting as an attorney for CTI and Wheeler, had no legal basis to advise Wheeler that he could invoke the privilege and resist disclosure. When Fehn, with

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[10]493 U.S. at p. 556.

knowledge of Wheeler's activities, assisted in the preparation and filing of the quarterly reports, without revealing Wheeler's activities he aided and abetted Wheeler and CTI in violating rules 240 10b-5, 12b-20 and 15d-13.

III.

Injunction

Plaintiff moves for a Permanent Injunction against defendant Fehn. In *S.E.C. v. Murphy*, 626 F.2d 633 (9th Cir. 1980) the Ninth Circuit enumerated certain factors that the Court must weigh in deciding whether to issue an injunction. Among those factors are the age of the defendant; his lack of recognition that his conduct was wrong, his professional occupation and whether he is likely to violate the securities laws in the future.

Mr. Fehn, is sixty years old and has been practicing specializing in the Securities field for approximately twenty-five years. He was certainly cognizant of the fact that the purpose of the Securities Acts is to "protect investors by promoting full disclosure of information thought necessary to informed investment decisions": *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953). The Court in *S.E.C. v. Murphy*, 626 F.2d 633, 642 (9th Cir. 1980) explained that the Acts constitute a comprehensive plan to insure that investors are protected by requiring the filing of Registration Statements containing material facts bearing upon the investment merit of publicly offered securities. The most material information are facts concerning the issuers.

Fehn knew at the time the securities were being publicly traded that the investors had not been alerted by the Registration Statements that CTI was a shell corporation, that it was Bud wheeler's deal to the extent that Wheeler organized it, acted as its Board of Directors, stripped the warrants from the stock and resold the stock alone and had

converted to himself a major portion of the proceeds of the IPO. All of this would have been material information to the investing public.

When Fehn had the opportunity to make this information public in the March 31, 1988 10-Q report he failed to do so because Wheeler did not want any disclosure made. As the Court observed in *S.E.C. v. Frank*, 388 F.2d 486, 488 (2nd Cir. 1968); A lawyer, no more than others, can escape liability for fraud by closing his eyes to what he saw and could readily understand. Or as the District Court for the District of Columbia held:

> Lawyers are not free to ignore the commercial substance of a transaction which could obviously be misleading to stockholders and the investing public.... [T]his Court rejects the proposition that a member of the bar can seek refuge behind a legal technicality, elevating form over substance, when he is a party to and fully familiar with the circumstances which indicate that illusory transactions are being undertaken which could be utilized to mislead third parties. (The attorney's] focus on the narrow legal question on which he opined in unrealistic in view of his participation in the total transaction which obviously had the possibility for misleading outsiders.

S.E.C. v. National Student Marketing Group, 402 F. Supp. 641, 647-8 (D.D.C. 1975).

As applied to the instant case, Fehn with knowledge of CTI's violation of the securities law gave comfort to the wrong doer, Wheeler, by advising him and the corporation of a right to silence where disclosure was legally mandated. What is more troubling is that Fehn's legal opinion had no basis in fact or law. This Court considers Fehn's actions in this case to be a most serious transgression for a practitioner in the securities field because it lends the imprimatur of

legality to corporate misfeasance which strikes at the heart of the regulatory system — open disclosure.

The defendant stated in his testimony and his declaration previously filed in this action[11] that it was his opinion at the time the 10-Q filings were made and it is his opinion now that the CTI periodic reports did not omit any material facts that were required to be disclosed.

After considering the totality of the evidence discussed above, this Court is of the opinion that there is a reasonable likelihood of future violations of the Federal Securities laws by the defendant Fehn. *S.E.C. v. Murphy*, 626 F.2d at 655; *S.E.C. v. Research Automation Corp.*, 585 F.2d 31, 36 (2d Cir. 1978).

INJUNCTION ORDER

I.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Fehn, his agents, servants, employees, and those persons in active concert or participation with him, who receive actual notice of this Final Judgment by personal service or otherwise, and each of them be and hereby are permanently restrained and enjoined from, directly or indirectly, in the offer or sale of any security, by the use of any means or instruments of transportation or communication interstate commerce or by use of the mails:

(1) employing any device, scheme or artifice to defraud;

(2) obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the state-

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[11] Docket #31.

ments made, in light of the circumstances under which they were made, not misleading; or

(3) engaging in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchasers of such securities.

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Fehn, his agents, servants, employees, and those persons in active concert or participation with him, who receive actual notice of this Final Judgment by personal service or otherwise, and each of them be and hereby are permanently restrained and enjoined from, directly or indirectly, in connection with the purchase or sale of any security, by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange:

(1) employing any device, scheme or artifice to defraud;

(2) making any untrue statement of material fact or omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Fehn, his agents, servants, employees, and those persons in active concert or participation with him, who receive actual notice of this order by personal service or otherwise, and each of them, be and are hereby

permanently restrained and enjoined from, directly or indirectly, failing or causing a failure to file with the Commission on behalf of any issuer whose Registration Statement has become effective pursuant to the Securities Act of 1933 in accordance with such rules and regulations that the Commission may prescribe as necessary and appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required, in a timely manner and in proper form, pursuant to Sections 13 and 15 of the Securities Exchange Act of 1934 [15 U.S.C. 78m and 78o] and the rules and regulations promulgated thereunder including, but not limited to: annual, quarterly and current reports on Forms 10-K, 10-Q, and 8-K in accordance with instructions on such forms, and such further material information, if any, as may be necessary to make the required statement, in light of the circumstances under which they were made, not misleading; provided, however, that nothing above shall apply to any issuer for which the duty to file such reports has been suspended or excepted pursuant to the provisions of the Securities Exchange Act of 1934.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction of this matter for all proposes.

This Court makes an express determination that there is no just reason for delay and the Clerk of the Court is hereby directed to enter this Final Judgment.

IT IS SO ORDERED, dated April 1, 1994

/s/ MARY JOHNSON LOWE

Mary Johnson Lowe
Senior United States District Court

Exhibit 1, rulings on evidence made at trial.

(2)

Supreme Court, U.S.
FILED
JUL 29 1997
CLERK

No. 96-1883

In the Supreme Court of the United States

OCTOBER TERM, 1996

H. THOMAS FEHN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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21pp

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against compelled self-incrimination permits a corporation to make materially misleading statements in reports required to be filed with the Securities and Exchange Commission, on the ground that the truthful disclosure of omitted information would incriminate the corporation's controlling person.

2. Whether, in light of this Court's decision in *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164 (1994), and Section 20(f) of the Securities Exchange Act, 15 U.S.C. 78t(f), which was added to the Act while this case was pending on appeal, the Commission could maintain this injunctive action against petitioner for aiding and abetting violations of the securities laws.

3. Whether the court of appeals deprived petitioner of due process by concluding that Section 20(f) of the Securities Exchange Act authorizes this injunctive action without ordering supplemental briefing or oral argument directed to that issue.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1883

H. THOMAS FEHN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 97 F.3d 1276. The opinion of the district court (Pet. App. 1c-27c) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1996. A petition for rehearing was denied on February 21, 1997. Pet. App. 1b. The petition for a writ of certiorari was filed on May 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a California attorney who, in 1987, represented the underwriter of an initial public

offering (IPO) of stock in CTI Technical, Inc. CTI was a Nevada corporation controlled by Edwin Wheeler, who also served as company president and chief executive officer. Pet. App. 8a-10a.

Shortly after the IPO, the Securities and Exchange Commission initiated an investigation, which ultimately revealed that the CTI offering had been fraught with federal and state securities law violations, and that the company's president, Edwin Wheeler, and others had engaged in a scheme to defraud investors by manipulating the price of the securities in "after-market" trading after the close of the offering. [1] Petitioner, who was not alleged to have participated in the violations arising out of the IPO, was retained to represent CTI, Wheeler, and others in connection with the Commission's investigation. Pet. App. 9a.

In the course of the Commission's investigation, petitioner learned that CTI had failed to file the quarterly reports on Form 10-Q that public companies are required to file with the Commission under Section 15(d) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78*o*(d), and implementing regulations, 17 C.F.R. 240.15d-13 (Rule 15d-13). Petitioner counseled Wheeler that CTI was required to file quarterly reports; he then reviewed and edited drafts of quarterly reports on behalf of CTI, and had

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[1] On September 18, 1989, CTI and Wheeler consented to a permanent injunction in a civil enforcement action brought by the Commission. Wheeler was subsequently convicted of securities fraud for false and misleading statements and omissions in the registration statement CTI had filed with the Commission in connection with its offering. See *United States* v. *Wheeler*, 29 F.3d 637 (9th Cir. 1994) (Table) (affirming conviction).

the final versions of three quarterly reports filed with the Commission. Pet. App. 10a-11a.

Petitioner knew that the quarterly reports were false and misleading in two regards. First, the reports gave a history of CTI that described Wheeler as a former consultant to the company who had only recently joined CTI. Petitioner knew, however, that Wheeler had promoted and controlled the company from its inception, and that the nominal directors of CTI were figureheads. Pet. App. 42a, 8c. Second, the quarterly reports described the company's financial position without disclosing material contingent liabilities arising from potential litigation in connection with its IPO. Petitioner knew, however, that CTI had significant litigation exposure from the federal and state securities law violations uncovered in the Commission's investigation of the IPO, and that the contingent liabilities presented by such potential litigation were material to the company's financial condition. *Id.* at 11a, 32a, 42a.

2. The Commission, alleging that petitioner had aided and abetted violations of Sections 10(b) and 15(d) of the Exchange Act (15 U.S.C. 78j(b), 78*o*(d)), as well as SEC Rules 10b-5, 12b-20, and 15d-13 (17 C.F.R. 240.10b-5, 240.12b-20, 240.15d-13), by assisting in the filing of the materially false and misleading quarterly reports by CTI, brought this injunctive action against petitioner. The Commission sought an order enjoining petitioner from violating the securities laws in the future. The district court agreed that petitioner had aided and abetted the CTI violations. It concluded that the false and misleading quarterly reports established the underlying violations, that petitioner knew that those reports were false and misleading and that he was contributing to CTI's

violations, and that petitioner rendered substantial assistance in the preparation and filing of the false reports. Pet. App. 17c-19c. The court concluded that an injunction was warranted because of the reasonable likelihood of future violations by petitioner. *Id.* at 25c.

3. On April 19, 1994, after issuance of the district court's injunction, this Court decided *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164. *Central Bank* held that there is no implied private right of action for damages against those who aid and abet violations of Section 10(b) of the Exchange Act but who do not themselves violate Section 10(b). The majority opinion in *Central Bank* did not address whether its ruling also precluded enforcement actions by the Commission against those who aid and abet violations of Section 10(b), although the dissenting opinion suggested that the logic of the majority opinion did preclude such enforcement actions. See 511 U.S. at 200 (Stevens, J., dissenting).

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, arguing that *Central Bank* precluded the Commission's action against him. Petitioner also contended that the district court had erred in finding that he aided and abetted CTI's securities law violations, and that the Fifth Amendment privilege against self-incrimination precluded liability based on CTI's failure to disclose its past violations in its quarterly reports.

4. On December 22, 1995, after oral argument before the court of appeals but before the issuance of its decision in this case, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. Section 104 of the PSLRA, entitled "Authority of Com-

mission to prosecute aiding and abetting" and codified as a new Section 20(f) of the Exchange Act, 15 U.S.C. 78t(f), provides that, for purposes of Commission injunctive actions brought under Section 21(d)(1) of the Exchange Act, 15 U.S.C. 78u(d)(1), "any person that knowingly provides substantial assistance to another person in violation" of the Exchange Act "shall be deemed to be in violation * * * to the same extent as the person to whom such assistance is provided." Section 21(d)(1) authorizes the Commission to seek an injunction from the district court "[w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter." 15 U.S.C. 78u(d)(1).

5. On October 9, 1996, the court of appeals affirmed the district court's injunction against petitioner. The court of appeals did not reach the question whether the Commission's action against petitioner based on his having aided and abetted CTI's securities law violations was precluded by the reasoning of *Central Bank*. The court held instead that the injunctive action was authorized by the new Section 20(f) of the Exchange Act, enacted in Section 104 of the PSLRA, which "appears to prevent lower federal courts from extending the logic of *Central Bank* to SEC injunctive actions." Pet. App. 13a.

The court of appeals first noted that, "[b]y its clear terms, Section 104 provides that aiding and abetting a violation * * * is itself a violation, and as such is subject to injunctive actions and civil actions for money penalties by the SEC." Pet. App. 14a. It then concluded that the new Section 20(f) applies to this case, after employing the retroactivity analysis of *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994).

Although the court noted that Congress had not expressly prescribed that Section 20(f) was to be applied to pending cases (Pet. App. 20a), it found that application of Section 20(f) to this case would not be retroactive, because the new provision "does not 'attach new legal consequences' to the events underlying the SEC's injunction of [petitioner]," but simply restored the legal regime to its status at the time that the district court had entered its judgment. *Id.* at 22a. The court also concluded that Section 20(f) falls within a well recognized exception to the presumption against retroactivity, for it "authorizes or affects the propriety of prospective relief." *Id.* at 24a (quoting *Landgraf*, 511 U.S. at 273).

The court also rejected petitioner's Fifth Amendment claim. Pet. App. 33a-38a. Following *California* v. *Byers*, 402 U.S. 424 (1971), and *Baltimore City Department of Social Services* v. *Bouknight*, 493 U.S. 549 (1990), the court considered whether the requirement of disclosure in the quarterly reports "targets a highly selective group inherently suspect of criminal activities, rather than the public generally," or involves "an area permeated with criminal statutes, rather than an essentially noncriminal and regulatory area of inquiry," and whether compliance "would surely prove a significant link in a chain of evidence tending to establish guilt * * * rather than disclosing no inherently illegal activity." Pet. App. 34a-35a (internal quotation marks and brackets omitted). In accord with the Second Circuit's decision in *United States* v. *Stirling*, 571 F.2d 708, cert. denied, 439 U.S. 824 (1978), the court concluded that the quarterly-report disclosure requirements do not implicate any of those concerns. The court observed that the Exchange Act and its regulations are essen-

tially regulatory and noncriminal, that those provisions are aimed at commercial entities generally and not specifically at a "highly selective," "inherently suspect" group, and that the underlying regulated activity (the sale of stock) is "inherently lawful" as a general matter. Pet. App. 37a-38a.

ARGUMENT

The court of appeals correctly concluded that the Exchange Act's disclosure requirements applicable to CTI's quarterly reports did not implicate the Fifth Amendment privilege against compelled self-incrimination, and that petitioner therefore could be held responsible as an aider and abettor for substantially assisting CTI's violations of that disclosure obligation. The court also correctly held that the Commission is authorized to obtain injunctive relief against petitioner for his aiding and abetting violations of the securities laws. Neither ruling conflicts with the decision of any other court of appeals or of this Court. Further review is therefore not warranted.

1. Petitioner contends that there was no underlying violation of the securities laws, and therefore he could not be found liable for aiding and abetting such violations. According to petitioner, there was no underlying violation because the Fifth Amendment privilege against compelled self-incrimination shielded from disclosure the information withheld from CTI's quarterly reports. Petitioner contends that the court of appeals' rejection of that Fifth Amendment defense is inconsistent with *California* v. *Byers*, 402 U.S. 424 (1971), and *United States* v. *Matthews*, 787 F.2d 38 (2d Cir. 1986). Those contentions are erroneous.

a. In *Byers*, the Court held that a California "hit and run" statute that required a driver involved in a car accident to stop and give his name and address to the police did not infringe the driver's privilege against compulsory self-incrimination because the information sought was not generally and inherently incriminating and was required to be disclosed for regulatory purposes. *Byers* thus established that the Fifth Amendment does not shield information from disclosure when the information is required to be disclosed for regulatory purposes rather than for purposes of criminal law investigation, and when the information required is, as a general matter, not inherently indicative of criminal activity. See 402 U.S. at 430-431 (plurality opinion); *id.* at 454-456 (Harlan, J., concurring in the judgment). As the Court explained in *Baltimore City Department of Social Services* v. *Bouknight*, 493 U.S. 549, 556 (1990), "the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."

The Fifth Amendment privilege does not preclude the application of a neutral disclosure requirement merely because that requirement may effectively lead to disclosure to the government of incriminating information *in a particular case.* In *Byers*, the plurality explained that point by reference to the Court's decision in *United States* v. *Sullivan*, 274 U.S. 259 (1927). In *Sullivan*, a bootlegger prosecuted for failure to file an income tax return contended that the Fifth Amendment privilege gave him a complete defense; the bootlegger's tax return would have tended to incriminate him by revealing the unlawful source of his income. Nevertheless, this Court

in *Sullivan* held that the privilege did not apply, for although the compelled filing of a tax return in that case would have tended to incriminate the bootlegger, the questions in the income tax return were neutral on their face and directed to the public at large. See *Byers*, 402 U.S. at 429 (plurality opinion) (discussing *Sullivan*).

In this case, as in *Byers*, information neutral on its face was required to be disclosed for regulatory purposes. The federal securities laws require public companies to file, for the benefit of investors, periodic reports of their business activities. The reports in this case were required to include financial statements. See 15 U.S.C. 78m; SEC Rule 13a-13, 17 C.F.R. 240.13a-13; SEC Form 10-Q. Further, information contained in those reports must be truthful and complete so as not to mislead investors. See 15 U.S.C. 78j(b); SEC Rules 10b-5 and 12b-20, 17 C.F.R. 240.10b-5 and 240.12b-20. The kind of information required to be disclosed is generally neutral, although in this particular situation it might have revealed criminal wrongdoing. Thus, the decision below is fully consistent with *Byers*; indeed, in *Byers*, the lead opinion pointed to the reporting provisions of the federal securities laws as an example of a constitutionally permissible regulatory regime that requires disclosure even though the required information might be incriminating in a particular case. See 402 U.S. at 427-428.

The court of appeals correctly rejected petitioner's Fifth Amendment argument for another reason: CTI, the corporation that was required to file the quarterly reports, had no Fifth Amendment privilege against self-incrimination. Any Fifth Amendment privilege belonged only to Wheeler, the company's

president, not to the company. See *Hale* v. *Henkel*, 201 U.S. 43 (1906). Wheeler, moreover, could not interpose his personal privilege to excuse the company from its obligation to make truthful and complete disclosures under the reporting and antifraud provisions of the securities laws. As the Court made clear in *Braswell* v. *United States*, 487 U.S. 99, 115-116 (1988), a corporate officer may not invoke the Fifth Amendment to bar production of corporate records that might personally incriminate him.

Matthews, the Second Circuit decision on which petitioner relies, is not inconsistent with those Fifth Amendment principles. In *Matthews*, the court held that the defendant could not be convicted of violating Section 14(a) of the Exchange Act, 15 U.S.C. 78n(a), and SEC Rule 14a-9, 17 C.F.R. 240.14a-9, which prohibit false and misleading representations in proxy solicitations. The government's theory in that case was that Matthews, who was a management candidate for director, should have disclosed in the company's proxy statement that he was a member of a conspiracy to bribe state tax officials on matters relating to the corporation, even though at the time he had not even been indicted for that crime (he was in fact later acquitted on that charge). The court emphasized that the SEC's regulations and forms expressly required only that convictions and pending criminal proceedings be disclosed, 787 F.2d at 47, and held that Matthews was not otherwise obligated by the regulations' general provisions prohibiting materially false or misleading proxy statements to accuse himself of participation in a conspiracy as to which no formal charge had been made, *id.* at 46. In this case, by contrast, it is clear that the omission of information from CTI's quarterly reports rendered the

statements that were made in those reports materially misleading. Accordingly, there is no conflict between the decision below and *Matthews*.

2. Petitioner also argues that the court of appeals erred in concluding that the newly enacted Section 20(f) of the Exchange Act authorized the district court's injunction preventing him from engaging in future violations of the Exchange Act. He argues that Section 20(f) should not be applied to his case because, in his view, its application here would violate the presumption against retroactivity of new statutes. That contention is incorrect.

First, the application of Section 20(f) to this case should not be viewed as involving a statute's retroactive application since Section 20(f) did not work a "change" in the law within the meaning of retroactivity analysis. As this Court made clear in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 269-270 & n.23 (1994), legislation is deemed retroactive only when it changes legal rights, duties, disabilities, or consequences. See also *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, No. 95-1340 (June 16, 1997), slip op. 8-10. Section 20(f), however, did not change the law, as reflected in the prevailing judicial decisions, at the time of its enactment with respect to injunctions in favor of the Commission in aiding and abetting cases.

Although petitioner argues that the reasoning of this Court's decision in *Central Bank* precluded Commission actions, in fact, *Central Bank* held only that there is no implied private action for damages under Section 10(b) for aiding and abetting. *Central Bank* did not decide whether the Commission may bring an injunctive action to prevent such aiding and abetting. See *United States* v. *O'Hagan*, No. 96-842

(June 25, 1997), slip op. 20 (emphasizing that *Central Bank* "concerned only private civil litigation under § 10(b) and Rule 10b-5" and was based on policy concerns about the implied private civil action available under Rule 10b-5). When Section 20(f) was enacted, the pre-*Central Bank* case law holding that the Commission could bring enforcement actions against aiders and abettors remained in effect in the Ninth Circuit, where this case arose, and had not been significantly questioned in the lower courts.[2]

The fact that Congress, in enacting new Section 20(f), eliminated doubt as to the Commission's authority to bring an enforcement action based on aiding and abetting does not mean that Section 20(f) changed the law, within the meaning of the Court's analysis of retroactivity in *Landgraf*. The possibility that this Court's reasoning in a decision might be extended, as petitioner urges with respect to *Central Bank*, to a set of cases not yet covered by the decision's holding is not the same thing as establishing the law on a given subject. Neither this Court nor any court of appeals has ever held that *Central Bank* precluded Commission actions for aiding and abetting. Nor does

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[2] See *SEC* v. *Arthur Young & Co*, 590 F.2d 785 (9th Cir. 1979) (aiding and abetting violation of Section 15(d)); see also *SEC* v. *Falstaff Brewing Corp.*, 629 F.2d 62 (D.C. Cir.), cert. denied, 449 U.S. 1012 (1980); *SEC* v. *Coven*, 581 F.2d 1020 (2d Cir. 1978), cert. denied, 440 U.S. 950 (1979); *SEC* v. *Coffey*, 493 F.2d 1304 (6th Cir. 1974), cert. denied, 420 U.S. 908 (1975); *SEC* v. *International Chem. Dev. Corp.*, 469 F.2d 20 (10th Cir. 1972); *SEC* v. *Barraco*, 438 F.2d 97 (10th Cir. 1971). At the time that Section 20(f) was enacted (and even now), only one district judge had extended *Central Bank* to a Commission enforcement action. *SEC* v. *United States Envtl., Inc.*, 897 F. Supp. 117, 119-121 (S.D.N.Y. 1995).

that question, which the court of appeals never reached, now warrant this Court's review, given the enactment of Section 20(f) to preserve the existing understanding of the law and prevent the extension of *Central Bank* to Commission cases.

As neither *Central Bank* nor Section 20(f) changed the law with respect to Commission actions, it is apparent that *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298 (1994), relied upon by petitioner, has no bearing on this case. In *Rivers*, the Court applied the presumption against retroactivity to a provision of the Civil Rights Act of 1991 that overturned *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989) (which, in turn, had disapproved extensive court of appeals authority to the contrary) and returned the law to its state in most of the courts of appeals before the *Patterson* decision definitively interpreted the relevant statutory provision, 42 U.S.C. 1981. The Court noted in *Rivers* that Congress had *not*, in the Civil Rights Act of 1991, described the effect of its new provision as restoring prior law, but had described it rather as expanding the scope of prior civil rights legislation. 511 U.S. at 308. In the present case, the legislation at issue was enacted before there was any change in the law, in order to confirm the law as it existed. Similarly, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), also relied upon by petitioner, concerned Congress's attempt to change previous law with respect to the statute of limitations in private securities actions. Here, by contrast, the legislation at issue did not change the law.

Second, even if Section 20(f) might be said to have changed the law, that Section nonetheless does not implicate the presumption against retroactivity in

this case, because the remedy entered here, an injunction against future wrongdoing, is forward-looking. Such injunctions do not attempt to right wrongs already done by restoring one or both parties to an earlier position. Instead, injunctions such as the one at issue here operate on future conduct to prevent future harm. The reason for examining past misconduct in this case was not to assess and remedy the harm already caused; rather it was to evaluate whether the defendant was likely to engage in violations in the future unless enjoined. Thus, the fairness and due process concerns that underlie retroactivity analysis do not arise in the context of an injunctive action, in which the defendant is told what conduct is prohibited and given a chance to conform his conduct to the law in the future.

In recognition of the different character of injunctions and similar remedies, the Court in *Landgraf* distinguished prospective forms of relief from backward-looking remedies like damages. 511 U.S. at 285 n.37. In *Landgraf* the Court explained that, when a new statute authorizes or affects the propriety of prospective relief, it may be applied in pending cases without having retroactive effect, because "relief by injunction operates *in futuro*." *Id.* at 274. Thus, in accordance with *Landgraf*, the authorization of Commission injunctive actions in Section 20(f) may be applied to this pending case.

Finally, even if Section 20(f) might be said to have changed the law, it is nonetheless reasonable to conclude that Congress intended the new legislation to apply to all Commission cases, and not just to those involving post-enactment conduct. It would be inconsistent with the purpose of the legislation for Congress to have meant for *Central Bank* to be

extended to pre-enactment conduct, thereby creating a gap in the otherwise consistent law that the Commission can bring injunctive actions for aiding and abetting. It is more sensible to construe the legislation as applying the same law to all defendants, which would give full effect to Congress's decision that sound public policy requires that the Commission be able to enjoin aiders and abettors. In any event, the holding below that injunctive relief was proper in this case under Section 20(f) presents no issue of continuing importance warranting review by this Court.

3. Petitioner complains that the court of appeals "departed from the accepted and usual course of judicial proceedings" by ruling *sua sponte* that Section 20(f) applies to this case, without affording him an opportunity to brief or argue the question of retroactivity. Pet. 12. Petitioner asserts that he was entitled to oral argument on that issue under Federal Rule of Appellate Procedure 34. This case was orally argued, however, and Rule 34 nowhere suggests that another oral argument is required whenever a new issue arises. Further, nothing inhibits a court from determining for itself the controlling law. See *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993).[3] In any event, petitioner availed himself of the opportunity to brief the retroactivity issue in his petition to

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[3] This Court has itself had occasion to raise and decide an issue of retroactivity without briefing or argument on the issue. In *Allen* v. *Hardy*, 478 U.S. 255 (1986), the Court decided *sua sponte* that *Batson* v. *Kentucky*, 476 U.S. 79 (1986), should not be applied retroactively to cases pending on collateral review, even though neither party nor any lower court had addressed the issue.

the court of appeals for rehearing. Thus, he was not precluded from presenting his arguments concerning the issue to the court of appeals. [4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner asserts that the new legislation changed the standard for scienter in connection with aiding and abetting claims to "knowingly" providing substantial assistance, and he urges that the case be remanded to the district court for findings on his knowledge. Pet. 12. Remand is unnecessary, however, for the district court has already expressly found that petitioner had actual knowledge of the wrong that he assisted in carrying out. Pet. App. 18c.